

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

WILLIAM FAXON, JR., TRUSTEE, ET AL., appellants, v. THE UNITED STATES AND GEORGE W. Atkinson et al.	}	No. 119.
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APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

TUMACÁCORI, CALABAZAS, AND HUEBABI GRANT IN ARIZONA.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT AND BRIEF.

Suit was instituted in the Court of Private Land Claims for the confirmation of what is commonly called and known as the Tumacácori, Calabazas, and Huebabi grant or private land claim, situate in the valley of the Santa

Cruz River, Pima County, Ariz. There were three separate petitions filed for the confirmation of this claim, the petitioners in each claiming under the original grantee. Upon the motion of the United States the causes were consolidated and tried under the petition filed on March 2, 1893, by *William Faxon, jr., trustee, et al. v. The United States et al.*, the co-defendants of the United States being persons, it is alleged, who claimed some interest in the property adversely to the plaintiffs.

In this petition (R., 1-6) it was alleged that the claimants were the owners in fee and holders and possessors of a certain tract of land known as the Tumacácori, Calabazas, and Huebabi grant or private land claim in the Territory of Arizona; that such lands were so held under and by virtue of a certain instrument in writing, designated as a grant title, dated April 19, 1844, made and executed by the treasury department of Sonora in compliance with the law of the Mexican Congress of February 10, 1842, which, it was alleged, provided for the denouncement and sale of abandoned *pueblos*, and that under and by virtue of such law, and in compliance and furtherance of certain other laws and proceedings, the treasury department of Sonora, by its duly authorized officers, for a good and valuable consideration, to wit, the sum of five hundred dollars in lawful money of said department of Sonora and of the Mexican republic, and for other good and valuable considerations set forth in said grant title, did on April 18, 1844, sell and convey in fee to Don Francisco Alexandro Aguilar, the grantee therein, the lands mentioned.

It was further alleged that the laws under and by virtue of which said grant was made and the proceedings preceeding the issuance of said grant were as follows, that is to say :

1. That in the year 1806 Juan Legarra, governor of the Indian *pueblo* of Tumacácori, situated in the jurisdiction of Pimaria Alta, petitioned Don Alejo Garcia Conde, intendant of the province and of the royal treasury, political and military governor, and *juez privativo* (special judge), to issue to the Indians of the *pueblo* of Tumacácori a grant of lands for the *fundo legal* of the *pueblo* and also for the *estancia* (stock farm) of the *pueblo*, the grant asked for to replace the ancient title papers which had been given by the Spanish Government to the Indians of said *pueblo* and which had been lost or destroyed, and it was alleged that this petition was made to the intendant in accordance with the royal instructions of October 15, 1754, and article 81 of the royal ordinances and instructions in relation to the intendants of December 4, 1786.

2. That in accordance with said petition the lands petitioned for were ordered by the intendant to be surveyed by the proper officer, and on January 14, 1807, the said lands were surveyed and the boundary monuments established by Don Manuel de Leon, commandant of the *presidio* of Tubac.

3. That on April 2, 1807, the said Don Alejo Garcia Conde issued a royal patent or title, under the laws referred to, to the Indians of the *pueblo* of Tumacácori for the lands, as set forth in the proceedings in relation to the survey thereof, set out at length in the copy of the

original *expediente*, and which original title was duly registered in Book No. 174, existing in the *Juzgado Privativo*.

4. That under the law of the Mexican Congress of the 10th of February, 1842, providing for the denouncement and sale of abandoned *pueblos*, Don Francisco Aguilar, on April 18, 1844, became the owner, by purchase, for the sum of \$500, of the four square leagues of agricultural and grazing lands of the *fundo legal* of the abandoned *pueblo* of Tumacácori and the *sitios* of the *estancia* (stock farm) of Calabazas and the other places thereunder pertaining, the areas, boundaries, monuments, and *colindantes* of which are set forth in the corresponding proceedings of measurement made in the year 1807 by the commissioner and surveyor, Don Manuel de Leon; that the original proceedings of denouncement and sale to the said Aguilar are set out at length in the original *expediente* referred to, a registry of the sale and denouncement being made in the corresponding book.

To the petition is attached a sketch map (R., 6) of the grant.

It was further alleged that the original title by which said grant was conveyed to the aforesaid grantee was not in the possession or under the control of the petitioners, but together with other records and papers relating to the grant was in the possession and custody of the United States surveyor-general of the Territory of Arizona, and by reason thereof the claimants were unable to file the same or a copy thereof with their petition.

It was also alleged that, under the provisions of the eighth section of an act of Congress approved July 22,

1854, and other acts amendatory or in extension thereof, the claim was filed before the surveyor-general of Arizona on December 22, 1879, by John Curry and C. P. Sykes, who claimed to own the same by mesne conveyances from the original grantee; that said surveyor-general caused the grant to be investigated, and under date of January 7, 1880, reported the same to Congress, recommending the confirmation thereof. It was also alleged that no further action was ever taken upon the same by Congress or any other authorities of the United States.

It was also alleged that the petitioners held and possessed the said grant under divers mesne conveyances from the original grantee of said grant and his grantees; that the original grantees of said grant were Mexicans and citizens of the republic of Mexico, and at the time of the Gadsden treaty the owners of said grant were likewise Mexicans and citizens of the republic of Mexico; that the said grant is, and at the time of the execution of said treaty was, duly recorded in the archives of Mexico.

It was further alleged that all of the steps and proceedings in the matter of the grant and sale of said lands were regular, complete, and lawful, and vested a perfect and valid title in fee thereto in said grantee, and that said grantee at the time went into the actual possession, use, and occupation of said grant, and erected the proper monuments thereon, and that said grantee and his descendants and legal representatives have continued ever since and until the present time in the actual possession, use, and occupation of the same, and are now seized and

possessed in fee thereof. It is also alleged that said grant documents constituted a complete and definitive grant in fee by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years without good reason, which would subject said tract to adjudication to third parties who might apply for or denounce the same; that no forfeiture of said grant was ever claimed, and the petitioners were entitled to a confirmation of said grant with the metes and bounds set forth in the original survey and grant.

It was further alleged that the lands claimed by the petitioners were all the lands embraced within the original survey of said grant to the boundaries established and described therein, and that said lands were the lands embraced within the map filed by petitioners with their petition as Exhibit A.

On behalf of the United States, an answer (R., 20-22) was filed in the consolidated cases, in which it was denied that the plaintiffs, or any of them, were the owners in fee, holders, and possessors of the tract claimed, or that they held and possessed it under and by virtue of the instrument in writing designated in their petition as grant title. It was averred that as to whether or not the treasury department of Sonora, through any of its officers, or for the consideration set forth in the petition, or in consideration of any other sum, on April 18, 1844, sold and conveyed to one Don Francisco Alexandro Aguilar said lands or private land claim, the defendant had no information, but, on the contrary, it averred that if it did so, it was without warrant or authority of law and void.

It further averred want of knowledge or information as to whether or not said lands had theretofore been granted to the Indian *pueblo* of Tumacácori, as set forth in said petition, but avers that, if the same be true, said lands were abandoned about the year 1820, and by virtue thereof became public lands. It averred that the title to said property, if any, that was passed, was purely usufructuary and vested no estate, legal or equitable, in the said alleged *pueblo* or mission, but the same and the right of disposition thereof were reserved to the national government.

Further answering, it denied that under the law of February 10, 1842, said Aguilar, on April 18, 1844, became the owner by purchase or otherwise of any lands included in the alleged grant of 1807 to the *pueblo* of Tumacácori or any land granted to the said *pueblo* of Tumacácori.

It denied the correctness of the map or tracing of said alleged grant according to the alleged grant to the Indian *pueblo* of Tumacácori of 1807, or the mission thereof, and that the statements, either of law or fact, contained in the report of the surveyor-general of Arizona, dated January 7, 1880, made under the provisions of an act approved July 22, 1854, and acts amendatory thereto, were true.

It also denied that the grant set forth in the petition was located and recorded as provided by the sixth article of the treaty of Mesilla (Gadsden purchase) executed December 30, 1853, and ratified June 30, 1854.

It denied that the plaintiffs owned, held, or possessed said grant under divers sundry mesne conveyances made

by the original grantee and his grantees, and averred that if they asserted such a claim to the same, it was without merit and null and void, because the original grantee never had any title, either legal or equitable, thereto.

As to whether or not said original grantee or any of his transferees were Mexican citizens, it averred it had no knowledge or information, but denied that they or any of them were ever owners of said property as against the republic of Mexico or are now the owners thereof as against the United States or its grantees; and it also denied the regularity, completeness, and lawfulness of the steps and proceedings in the matter of the alleged grant and sale of said lands as set forth in the petition, or that, if taken as alleged, they vested a perfect and valid title in fee or in equity thereto in said grantee.

It further denied that the said grantee at said time, to wit, in the year 1844, went into actual possession, use, and occupation of said grant and erected monuments thereon, for the reason that at the time of said alleged grant, in the year 1844, no description of said property was known or set forth by which proper monuments could be erected, or that the said grantee and his said legal representatives have continued ever since and until the time of the filing of said petition in the actual possession, use, and occupation of the same, or that they were at said time seized and possessed in fee or in equity thereof.

It denied that the said alleged grant documents constituted a complete and definite grant in fee or in equity, by way of sale, coupled with the condition subsequent

not to abandon the same for a longer period than three years without good reason, which would subject the tract to the adjudication of third parties who might apply for or denounce the same; that no forfeiture of said grant was ever claimed; but, on the contrary, it averred that said alleged proceedings, as set forth in said petition, were never taken under the express order or approval of the general government, and were never submitted to said general government for ratification or approval, and therefore were declared null and void under and by virtue of the decree of November 25, 1853, and said transfer to the United States under the treaty of Mesilla was a resumption of sovereignty over the same and forfeiture thereof, and it averred that the United States took the same free and clear of any incumbrance, claim, or right by virtue of said proceedings, as set forth in said proceedings, denying the right of the plaintiffs to confirmation as prayed for in said petition.

Further answering, it said that the lands claimed by plaintiffs, if said alleged proceedings were regular, valid, and in due form, were a great deal more than contained in said original survey, and it alleged that said alleged grant or patent was a sale, if at all, by quantity and limited to six *sitios* and no more, and that the same was the only quantity of land paid for by the alleged grantee, if any payment at all were in fact made.

It was averred that no official or officials of any department of the republic had authority to issue final titles of sale to the public lands until after the same had been submitted to the treasury of the national government

and approved by it and authority given therefor, and that this grant was without warrant or authority of law because the proceedings were not submitted to the national government for approval before the final issue of the patent, as provided by law, and that said alleged proceedings were otherwise improper and void and conformed to no law of the republic of Mexico, and that said grant is so indefinite and uncertain as to description as to carry no title to any land. (R., 20-22.)

A copy in Spanish of the *titulo* of the grant of 1807 is found in the record (pp. 242-259).¹

A copy in Spanish of the *titulo* of the grant of 1844 is found in the record (pp. 260-264).

It appears that Ignacio Lopez, claiming to be the treasurer of the department of Sonora, undertook in April, 1844, to sell the lands of the abandoned town (*pueblo*) of Tumacácori, which had been set apart to said town in the year 1807 by order of Intendant Conde, claiming the same to belong to that class of lands known as temporalities (*temporalidades*). The law recited as authority for his action was the decree of Santa Anna of February, 1842. (See *Reynolds S. & M. L. L.*, 239.) Appellants' translation of the alleged *titulo* of 1844 is found in the record (pp. 280-284), but the Government deems it proper to submit its own translation, which is as follows:

Second Seal.	Seal.	Four Dollars.
Eighteen hundred and fortyfour and eighteen hundred and fortyfive.		

Ignacio Lopez, Captain of Cavalry retired to the Infantry, Honorary Intendant of the Army and Treasurer of the Department of Sonora.

Whereas the supreme decree of February 10th, 1842, provides for the sale, on account of the critical condition of the public treasury, of the properties pertaining to the department of temporalities, of which class are the farming lands and the lands for breeding cattle and horses respectively of the four leagues of the townsite of the depopulated town of Tumacácori and the two *sitios* of the stockfarm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano and Calabazas, whose areas, boundaries, monuments and coterminous tracts are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned surveyor, Don Manuel de Leon, veteran Ensign and late Commandant of the *presidio* of Tubac, according to the information obtained in relation thereto at the instance of this departmental Treasury, said temporal farming and grazing lands being valued in the sum of five hundred dollars, as provided in article 2d of the aforesaid supreme decree of February 10th, 1842; and complying punctually therewith I have ordered the formation of the corresponding *Expediente* by the Court of First Instance and of the Treasury of the District of San Ignacio, during which proclamations (*pregones*) no bidder appeared; therefore, and in compliance with article 73 of the law of April 17th, 1837, as the sale in question on account of the national Treasury does not exceed five hundred dollars, this said Treasury proceeded to the public sale of the aforementioned lands of the depopulated Tumacácori and the lands of its stockfarm, Calabazas, and other annexed points, all belonging to the department of temporalities, on the 16th, 17th and 18th of the current month of April, in solicitation of bidders, without there being any other than Don Francisco Alexandro Aguilar, a merchant and

resident of this port and village of San Fernando de Guaymas, for said sum of five hundred dollars, the appraised value at which said temporalities have been sold, as appears from the third and last offer, which literally is as follows : * * *

In the port and village of San Fernando de Guaymas, on the eighteenth of April eighteen hundred and forty four, I, the undersigned departmental Treasurer, being in the office of this Treasury under my charge, with my attendant witnesses, Don José Maria Mendoza and Don Vicente Irigoyen, in the absence of a Notary of the Treasury and of a Notary Public, in compliance with the provisions of article 73 of the law of April 17th 1837, since the price or value of the temporalities to which these proceedings relate do not exceed five hundred dollars, ordered that the third and last offer be made for the final sale of the temporal lands of Tumacácori and Calabazas referred to in this *Expediente* and that to that end a proclamation be made to the public at the sound of the drum, as, in effect, the public crier, Florentino Baldizan, made, in a high and clear voice, saying: "The Treasury of the Department is going to sell, on account of the national Treasury and in accordance with the supreme decree of February 10th 1842, the agricultural lands and lands for raising cattle and horses which comprise the four leagues of the townsite of the depopulated town of Tumacácori and the two *sitios* of the depopulated stock-farm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano and Calabazas, situated in the District of San Ignacio, the areas, monuments, boundaries and coterminous tracts of which are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned surveyor, Don Manuel de Leon, veteran Ensign and late Commandant of the *presidio* of Tubac, as ap-

pears from the information obtained at the instance of said departmental Treasury, from which it also appears that the original titles of grant and confirmation of said temporalities still exist, which temporalities have now been valued at five hundred dollars in accordance with article 2d of said supreme decree of February 10th, 1842. Whoever desires to make a bid, come forward and make it to this departmental Treasury where it will be received in conformity with the laws, with the understanding that the final sale is to be made now to whomever should be the highest bidder." In which act Don Francisco Alexandro Aguilar, a merchant and resident of this port, appeared and made the bid of five hundred dollars at which said temporalities are appraised, and no other bidder having appeared and the hour for midday prayer of this day having already struck, the public crier finally said: "Once, twice, three times; sold, sold, sold; may it do good, good, good to Don Francisco Alexandro Aguilar."

In these terms this act was concluded, the aforesaid farming lands and lands for raising cattle and horses of the depopulated townsite and stockfarm of the temporalities of Tumacácori and Calabazas being publicly and solemnly sold to Don Francisco Alexandro Aguilar, a merchant and resident of this port, for the sum of five hundred dollars.

And in due witness thereof and for the usual purposes these proceedings were closed and entered and I signed them together with the party in interest and my undersigned attendant witnesses.

IGNACIO LOPEZ.

Witness:

JOSÉ MARIA MENDOZA.

FRANCISCO A. AGUILAR.

Witness:

VICENTE IRIGOYEN.

In which legal terms was concluded the sale of the farming lands and lands for raising cattle and horses which comprise the four leagues of the depopulated townsite of Tumacácori and the two *sitios* of its stockfarm, Calabazas, and other annexed points, all temporalities, situated in the jurisdiction of the District of San Ignacio, the original *Expediente* remaining deposited in the archives of this Treasury as perpetual evidence, *with the understanding that when the original titles of Tumacácori and Calabazas are obtained, they shall be aggregated to the present one.*

Whereas the agricultural lands and lands for raising cattle and horses, which comprise the four leagues of the depopulated town of Tumacacori and the two *sitios* of its stockfarm of Calabazas and other annexed points, all temporalities, in the jurisdiction of the District of San Ignacio, have been publicly and solemnly sold to Don Francisco Alexandro Aguilar, a resident and merchant of this port, for the sum of five hundred dollars, which sum together with the others pertaining to the Treasury, he has paid into this departmental Treasury, I, therefore, in use of the powers the laws on the matter, as also the supreme decree of the 10th of February 1842, concede to me, by the present title and in the name of the Mexican Nation and of the Supreme Government formally cede, sell, give and adjudicate the said farming lands and lands for raising cattle and horses, which comprise the four leagues of the depopulated townsite of Tumacácori and the two *sitios* of its stockfarm of Calabazas and other annexed points already mentioned to the said buyer, Don Francisco Alexandro Aguilar, by way of sale, and with all the qualities, solemnities, firmness and subsistence the law establishes, for himself, his heirs,

children and successors, with all their entrances, exits, lands, timber, groves, shrubs, pastures, centers, circumferences, waters, springs, watering places, uses, customs, servitudes and other things pertaining to said possessions, with their enclosures, metes and bounds for the sum of five hundred dollars, at which they have been sold to said Francisco Alexandro Aguilar, with the precise condition that the said buyer, and his successors in their case, are to maintain the above mentioned agricultural lands and lands for raising cattle and horses that comprise the four leagues of the depopulated townsite of Tumacácori and the two *sition* of its stockfarm of Calabazas populated, possessed, cultivated and protected, without passing beyond their metes and bounds and without their being totally abandoned; with the understanding that if the said abandonment and depopulation of said farming and grazing lands should take place for the space of three consecutive years, by the neglect or fault of their owners or possessors and there should be any person who denounces them, in such event after verification of the fact, they shall be declared public lands and shall be sold at public sale, on account of the national Treasury, to whomever should be the highest bidder, excepting, as is just, those cases where the abandonment, depopulation or lack of protection are on account of the notorious invasion or hostility of enemies or epidemics or other like causes, and only for the period or periods of such occurrences, cautioning as the aforesaid Don Francisco Alexandro Aguilar and his successors are strictly cautioned that they are to restrict themselves to the belongings, metes and bounds of the aforesaid agricultural and grazing lands of the townsite of Tumacácori and its stock-

farm of Calabazas, constructing and maintaining on said possessions the necessary monuments of stone and mortar under the penalties established by the laws in case of neglect.

And with the powers, which they and the divers superior provisions that govern in the matter, concede and confer on me, I order and require respectively of the Judges, Justices and local authorities that at present are and shall hereafter be in the District of San Ignacio, that, for the sake of the good and prompt administration of justice and in observance of the aforesaid legal provisions they do not permit the said Francisco Alexandro Aguilar nor his successors to be, in any manner, disturbed, annoyed or molested in the free use, exercise, property, dominion and possession of the said agricultural lands and lands for raising cattle and horses of the townsite of Tumacácori and stockfarm of Calabazas, but rather shall watch and see with the greatest efficacy that they are always protected and maintained in the quiet and peaceable possession to which they are entitled by legitimate right, so that, in this manner, they may freely have the benefit of, enjoy, possess, sell, exchange, barter, donate, transfer, devise, cede and alienate the aforesaid agricultural lands and lands for raising cattle and horses of the four leagues of the townsite of Tumacácori and its stockfarm, Calabazas, and other annexed points, at their free arbitrament and election, as absolute owners and proprietors of said possessions, with the understanding also that just as soon as the original titles of said agricultural and grazing lands are obtained they shall be aggregated to the present ones, and the transmittal and delivery of said original documents are considered as made and verified from this moment in favor of said party in interest, Don Francisco Alexandro Aguilar.

In which terms I have issued this title of formal sale, transfer and adjudication to said Mr. Aguilar, his heirs and successors, delivering it to the former for his security and other convenient uses, *after entry thereof in the proper place.*

Given in the Port and village of San Fernando de Guaymas, on the nineteenth day of the month of April eighteen hundred and forty four, authenticated and signed by me, the Treasurer of the Department, sealed with the seal which this Treasury uses, before my undersigned attendant witnesses, in the absence of a Notary of the Treasury or a Notary Public, there being none, according to law.

IGNACIO LOPEZ.

Witness :

JOSÉ DIEGO LABANDERA.

Witness :

JOSÉ MARIA MENDOZA.

The form of this document is unusual. The instrument commences with the usual preamble, in which the authority for the action taken and the extent to which it was attempted to be exercised were recited. It is stated that the decree of February 10, 1842, provided for the sale, on account of the critical condition of the public treasury, of the properties pertaining to the department of temporalities, and that the farming lands and the lands for the breeding of cattle and horses respectively of the four leagues of the depopulated town of Tumacácori and the two *sitios* of the stock farm of the same, at the points of Huebabi, Portrero, Cerro of San Cayetano and Calabazas, the areas of which, the boundaries, monuments, and coterminous tracts were stated in the proceedings of survey executed in the year 1807 by the commissioned

surveyor, Don Manuel Leon. It was also stated that in accordance with article two of the decree of February 10, 1842, the department of the treasury had obtained information that said temporal, farming and grazing lands were valued at the sum of \$500, and complying punctually therewith he ordered the formation of an *expediente* by the court of first instance of the district of San Ignacio and by the treasury, and during the proclamations (*pregones*) no bidders appeared. It is further stated that as the sale in question was on account of the national treasury and did not exceed \$500, therefore, in compliance with article 73 of the law of April 17, 1837 (*Reynolds*, 225), the treasury proceeded to the public sale of the aforementioned lands of the depopulated town of Tumacácori and the lands of its stock farm, Calabazas, and other annexed points, all of which belonged to the department of temporalities; that said sale was held on the 16th, 17th, and 18th of said month of April, and that there were no bidders other than Don Francisco Alexandro Aguilar, a merchant and resident of the village and port of San Fernando de Guaymas, to whom for the said sum of five hundred dollars, at which said temporalities had been appraised, the same was sold as appeared from the third and last offer (*almoneda*). Then follows what is alleged to be a literal copy of the third and last *almoneda*. It will be noticed that this *almoneda* is not made by the board of sales, but by the departmental treasurer, Ignacio Lopez, with his attending witnesses, Don José Maria Mendoza and Don Vicente Irigoyen, clearly in violation of the very laws to which he refers for authority.

Continuing, after setting forth the *almoneda*, the preamble states: "In which legal terms was concluded the sale of the farming lands and lands for raising cattle and horses which comprise the four leagues of the depopulated town site of Tumacácori and the two *sitios* of its stock farm, Calabazas, and other annexed points, all temporalities, situated in the jurisdiction of the district of San Ignacio, the original *expediente* remaining deposited in the archives of this treasury as perpetual evidence, with the understanding that WHEN THE ORIGINAL TITLES OF TUMACÁCORI AND CALABAZAS ARE OBTAINED, THEY SHALL BE AGGREGATED TO THE PRESENT ONE.

By these recitals it will be seen that the officer making this sale did not have either the *expediente* or the *título* of the Tumacácori grant of 1807, and it does not appear that he had any information as to where they were, consequently he did not know what the boundaries were, and the only information he seems to have had was generally as to the area of the town site and the *estancia*.

It is apparent also that at that time there was nothing in the archives by way of record of the grant of 1807 from which any definite information could be obtained by Lopez as to this alleged original grant to the *pueblo* of Tumacácori.

It is further recited that the agricultural lands and lands for raising cattle and horses which comprised the four leagues of the depopulated *pueblo* of Tumacácori and the two *sitios* of its stock farm, Calabazas, and other annexed points, all temporalities, were publicly and solemnly sold to Francisco Alexandro Aguilar for the sum

of five hundred dollars, which sum, together with the others pertaining to the treasury, he paid at that time into the departmental treasury. It does not appear what the other payments pertaining to the treasury were, nor their amounts, but it may be inferred that they were the fees of the officers.

Based upon the foregoing preamble and its recitals, Lopez proceeded to formally pass the title of the four leagues constituting the town site of the depopulated town of Tumacácori and the two *sitios* of its stock farm Calabazas, and he recited that he did so under the authority conferred by the decree of February 10, 1842, to Don Francisco Alexandro Aguilar by way of sale, and *upon the condition that the buyer and his successors were to maintain the above-mentioned lands populated, possessed, cultivated, and protected, without passing beyond their metes and bounds and without their being totally abandoned, with the further understanding that if the same were to be abandoned and depopulated for a space of three consecutive years by reason of the neglect or fault of the owners and possessors, and there should be any other person to denounce them, upon verification of the facts, they should be declared public lands and sold at public sale, on account of the national treasury, to the highest bidder, excepting in those cases where the abandonment, depopulation, or lack of protection was on account of the notorious invasion or hostility of enemies, or epidemics, or other like causes, and only for the period or periods of such occurrences.* Aguilar, the grantee, and his successors were cautioned to restrict themselves to the belongings, metes, and bounds of the aforesaid agricultural and grazing lands of the town site of Tumacácori

and its stock farm Calabazas, and to construct and maintain on the said possession the necessary monuments of stone and mortar, under the penalties established by the laws in case of neglect.

It was ordered and required that the various authorities should not permit the said Aguilar nor his successors to be in any manner molested or interfered with in the free exercise of dominion over the lands referred to, but that they should be protected and maintained in the quiet and peaceable possession and enjoyment of the same, to which they were entitled by legitimate right; that Aguilar and his successors possessed the full right of disposition of the lands as absolute owners and proprietors thereof, "with the understanding also that just as soon as the original titles of said agricultural and grazing lands are obtained they shall be aggregated to the present ones, and the transmittal and delivery of said original documents are considered as made and verified from this moment in favor of said party in interest, Don Francisco Alexandro Aguilar." This refers to the title of 1807.

On April 19, 1844, Ignacio Lopez, with his attending witnesses, José Maria Mendosa and José Diego Labandera, concluded the granting clause in the following terms :

In which terms I have issued this title of formal sale, transfer, and adjudication to said Mr. Aguilar, his heirs and successors, delivering it to the former for his security and other convenient uses, *after entry thereof in the proper place.*

It is evident that this clause provided for some record other than leaving on file the *expediente*, and, from the

practice in such cases, the proper and regular entry should have been in the book commonly called the *Toma de Razon*.

No possession was ever taken by Aguilar, and no attempt to exercise any act of ownership on his part anywhere appears in the evidence.

The form of this instrument, to wit, that part which should be the *testimonio* of the *expediente*, and which should be preceded by the preamble (original) and followed by the granting clause (original), is unusual in this, that none of the proceedings leading up to the final issuance of the grant seem to be copied, except the third *almoneda* (R., 281-282) and this discloses the fact that the sale was not made by any board of sales, whether an attempt was made to sell under the law of April 17, 1837, or that of February 10, 1842, or not. This instrument was, however, identified on the trial by Eufemio Tapia as the instrument given to himself and Gutierrez from the archives when making their examination in the early part of 1857. (R., 45.)

Exhibit E (R., 284-285) purports to be a copy of a conveyance from Aguilar to Manuel Maria Gandara, dated at the port of Guaymas, March 31, 1856, in which it is stated that Aguilar appeared before the judge of the second instance at Guaymas and exhibited the title and a copy thereof, upon which copy, consisting of thirty-nine sheets, was indorsed the said conveyance from Aguilar to Gandara. On March 27, 1856, Ramon T. Cuen, judge of the first instance of Ures, made a copy of the *titulos* of 1807 and 1844, which copy consisted of thirty-nine leaves. The genuineness of the signature

and regularity and form of the certificate of Judge Ramon T. Cuen were certified to by the governor, José Aguilar (R., 285). On October 10, 1861, it was evidently thought necessary to further strengthen the various certificates which had been made, and a notary public, Jesus Meneses, was called upon to certify to the genuineness of the signature and official character of P. de Valois, before whom purports to have been executed the original deed, indorsed on the copy of the *títulos* of 1807 and 1844 (R., 284).

Exhibit F (R., 285-287) purports to be a conveyance, dated March 2, 1869, from Francisco Aguilar to Don Miguel Gandara, for and on behalf of his father, Don Manuel Maria Gandara, of the lands called Tumacácori, Calabazas, and Huebabi, which lands, it is alleged, belong to Aguilar by virtue of a title of sale made by the treasurer-general of the department of Sonora in 1844, which is based on the primitive title issued in 1807 for the lands of the natives of Tumacácori as a *fundo legal* of their *pueblo* and stock farm.

Counsel for the Government offered in evidence (R., 231) a certified copy of an affidavit, the original of which was on file with the Commissioner of the General Land Office, in the matter of the claim for the confirmation of this grant under the law of July 22, 1854, and the law of July 15, 1870, extending the provisions of the earlier law over the Territory of Arizona. This seems to have been omitted from the record, and is as follows:

Personally appeared before me, a notary public in and for the county of Pima, Territory of Arizona, United States of America, Manuel Escalante,

who, being duly sworn according to law, deposes and says as follows, to wit:

That he is a Mexican citizen; has practiced law many years in his own country, and resides at present in Nogales, county of Pima, Territory of Arizona, United States of America;

That he was personally and intimately acquainted with Francisco Alexandro Aguilar, Manuel Maria Gandara, and Miguel Gandara during their lifetime, and that they are the same persons whose names appear in the alleged deeds of the several sales of the "Tumacácori and Calabazas private land claim;"

That the said Francisco Alexandro Aguilar and Manuel Maria Gandara were brothers-in-law;

That for many years he has known of the sale of the "Tumacácori and Calabazas private land claim," alleged to have been made by the federal government of Mexico to the above-mentioned Francisco Alexandro Aguilar, in the city of San Fernando de Guaymas on the nineteenth day of April, eighteen hundred and forty-four;

That he has also known of the sale of the same "Tumacácori and Calabazas private land claim," alleged to have been made by said Francisco Alexandro Aguilar to the aforesaid Manuel Maria Gandara, in the city of San Fernando de Guaymas, on the second day of March, eighteen hundred and sixty-nine;

That likewise he knew of the sale of the said "Tumacácori and Calabazas private land claim," alleged to have been made by said Manuel Maria Gandara and Miguel Gandara, through their attorney in fact, Guillermo Andrade, to C. P. Sykes and John Currey, in the city and county of San Francisco, State of California, United States of America, on the twenty-fourth day of July, eighteen hundred and seventy-seven.

That his information of the several sales herein mentioned, except the last, came direct from the aforesaid Francisco Alexandro Aguilar;

That the aforesaid Francisco Alexandro Aguilar told him that Manuel Maria Gandara, herein above mentioned, had put his name in the alleged deed of the nineteenth of April, eighteen hundred and forty-four, transferring the said "Tumacácori and Calabazas private land claim" from the federal government to himself, the said Francisco Alexandro Aguilar, and likewise, in the same manner, to the alleged deed of the second of March, eighteen hundred and sixty-nine, transferring the said "Tumacácori and Calabazas private land claim" from said Francisco Alexandro Aguilar to the said Manuel Maria Gandara, and that he, Francisco Alexandro Aguilar, had never owned said lands, but simply acted as requested.

And further deponent saith not.

(Signed) M. ESCALANTE.

Subscribed and sworn to before me at my office in Nogales, Pima county, Arizona, this eighth day of July, eighteen hundred and eighty-nine.

(Signed) D. J. CUMMING,
Notary Public in and for Pima County.

Another proceeding to which it is desired to call the attention of the court is to be found in the documents marked 1, 2, 3, and 4 in the record (pp. 240, 241). These documents were evidently introduced to show that the *expediente* or *matrix* of the Tumacácori, Calabazas, and Huebabi grant was in the archives in 1857. Exhibits 1, 2, 3, 4, 5, and 6 (R., 235-239) were introduced to identify Toribio Gutierrez and Eufemio Tapia. The instrument offered in evidence as being the title of 1844 (R., 263)

shows by its recitals that the *matrix* (*expediente*) of 1807 was not in the archives in 1844. The list of *expedientes* on file in the archives which was made up at the instance of the Mexican and national government in 1855, shows that neither the *expediente* of the grant of 1807 nor that of 1844 was in the archives. (See Official Report of Special Agents Tipton and Flipper, etc., pp. 2, 3.) Eufemio Tapia, called as a witness on behalf of the claimants, and who is alleged to have signed document marked "(1)" (R., 240), was handed the document on file with the surveyor-general and now before this court, known as the title of 1844, and was asked to examine the same and say whether or not it was the paper that was sent to him in 1857; he replied, "If I am not mistaken, that is the same" (R., 45). He was the chief clerk of the treasury department and was afterwards acting auditor or treasurer-general. As has been before suggested, this document, purporting to be the grant of 1844, handed to the witness Tapia, and now before this court, is not the *matrix* (*expediente*), but is the *titulo*, and it therefore had no rightful place in the archives and possessed no value as evidence in the manner in which it purports to have been executed.

Taking the condition of these papers, commencing with that of 1807 and down to the deed of 1869 (Exhibit F, R., 285), and considering the absence of all evidence as to the existence of any note, minute, or memorandum of them in the archives and the absence of any note in the book of *toma de razon* for 1844, which book is still in existence, justifies a serious doubt as to the *bona fides* of this latter grant of 1844. Such doubts are justified by

the absence of all evidence of any possession of the property by Aguilar, the grantee. The evidence discloses that the earliest date at which any possession of any of this property was claimed or exercised was about 1852, and the weight of the testimony upon this point, introduced by claimants, was that this possession was first claimed or exercised in the years 1853 or 1854. It will be noted that the evidence of possession, either in 1852, 1853, 1854, or 1855, seems to have been by Gandara through his herdsmen, during which time it does not appear that Gandara had obtained any right or interest in the property from Aguilar or anyone else. Nor does it appear that Aguilar ever pretended to exercise any acts of ownership or control over the same or had any interest therein except as shown by Exhibits E and F. (R., 284-286.)

From the *titulo* of 1807 it appears:

The Indians of the mission of Tumacácori made application to Alejo García Conde, the intendant of the provinces of Sonora and Sinaloa, for a *fundo legal* or "town site" and for land for a stock farm for their mission. Application not dated, but it was received in the intendency December 17, 1806.

Application was made under article 81 of the Royal Ordinance and Instructions to Intendants of December 4, 1786 (R., 265). It appears from the application that an allotment had already been made to this same pueblo at some former time, but that the documents had been lost, and it is clearly and positively stated that the terms of those documents and the extent and boundaries

of the lands then allotted were absolutely unknown. (*Ibid.*) It is requested that a new allotment be made and that the lands allotted be surveyed under the provisions of the royal orders on the matter. (*Ibid.*)

It is requested that four leagues be measured, one league to each wind.

It is further requested that land for a stock farm be allotted to the same, and that the place known as Huebabi be allotted to them for that purpose and so surveyed as to include the land at the mouth of the Potrero creek.

This application, signed by Ignacio Diaz del Carpio for the applicants, as their attorney, was received in the intendancy December 17, 1806. On the same day Don Manuel de Leon, commandant of the *presidio* of Tubac, was commissioned to survey the lands at such times as the duties of his office would allow. He was specifically instructed to survey a *fundo legal* of "one league to each wind, or the four wherever is most convenient, of the best and most suitable lands near their town, without prejudice to third parties, and after summoning the coterminous owners, if any there be." He was also instructed to survey a stock farm, "*to include at most two sitios,*" in the place most convenient to said natives. (R., 266.)

This commission was delivered to Don Manuel Leon by Juan Legarra, governor of the Indians, and was accepted by him January 13, 1807. (R., 267.)

It was ascertained from the Indians themselves and from old residents of Tubac that there were no coterminous owners in any direction except those of Tubac

itself, and it does not appear that they were summoned, as directed by the intendant in his commission to Don Manuel Leon, to show their titles or to witness the survey. (R., 266.)

Assistants were appointed and duly sworn. (R., 268.)

SURVEY OF "FUNDO LEGAL."

Survey of the *fundo legal* was begun at the mission of San Jose de Tumacácori on January 14, 1807. This paragraph in the *expediente* (R., *ibid*) is somewhat obscure. It states that in the time of the late Governor Pineda an agreement was made—between whom is not stated—by which the valley lands down the river from the Tumacácori mission were given to the Indians. It is also stated that his excellency gave the Indians authority to take what was lacking in any other direction that was most convenient to them. It does not state what was lacking.

The commissioner made the survey with a compass in good adjustment.

Fifty cords were measured north to the south line of the *presidio* of Tubac. Three hundred and thirty-two cords were measured south to a point "on the upper side, adjoining the gulch, close to the place called Calabazas."

It is not stated that a monument was placed here (R., 269), though one is referred to as having been placed here. The surveyor returned to the center, and seven cords were measured east "from the channel of the river" (R., 269). Observe that these seven cords

were measured east "from the channel of the river." The distance from the center to which they returned is not given. It is, as a matter of fact, about a quarter of a mile from the cemetery to the river, and the old irrigating ditches are evidence that this distance could not have been less when this survey was made.

They returned again to the center and measured eleven cords therefrom to the west.

With the measurement of these four lines, or really two lines, and the placing of piles of stones to mark the places where the monuments should be built, the survey terminated. No side lines were surveyed and no corners located. The agricultural lands in the valley were covered by the survey, and also some barren land on the east and west sides of the same. The survey was made to the satisfaction of the commissioner and the Indians, and signed by them and the assistants with that understanding.

It appears from the dates given in this *expediente* that the lines hereinbefore described and the north and south line of the stock farm were all measured in one day, the 14th of January, 1807.

SURVEY OF THE STOCK FARM (ESTANCIA).

The center or starting point of the stock farm was designated by the Indians January 14, 1807, and marked by a pile of stone. (R., 270.)

The designation of this point, the center or starting point of the "*estancia*," is important. A point was taken in the bottom along the river and was marked by a pile of stone. This pile of stone has disappeared and

there is now no means of determining where it stood. The description of the survey though precise is far from being definite.

From the designated center a line was measured north eighty cords to the south monument of the *fundo legal*.

Returning to the center, fifty-five cords were measured south to a point beyond the old mission of Guebabi.

January 15, 1807, twenty-seven cords were measured east from the center to a hill. Observe the language of the Spanish (R., 245). (R., 271.)

The line last described deserves attention. If this course be reversed and run west from the most southern point, or from any point of the San Cayetano Mountains, it will be entirely north of the most northern point of the "*estancia*" as described in this survey, or, in other words, there is no point whatever within the *estancia* from which a line can be run east to any point whatever of the San Cayetano Mountains. This last line is simply impossible.

From the center on the same day thirty-eight cords were measured west to the slope of the highest hillock (*loma*) seen from the Potrero.

In the survey of the stock farm a north and south line of one hundred and thirty-five cords and an east and west line of sixty-five cords were measured, inclosing an area equivalent to eighty-seven hundredths of one *sitio*.

It would seem that the intention was to survey a tract two leagues long by one league wide, or two *sitios*.

The survey of the stock farm was also made to the satisfaction of the commissioner and of the Indians, and the proceedings signed by them with that understanding.

On January 17, 1807, the commissioner's report, that is, the *expediente*, was delivered to the governor of the Indians for transmittal and delivery to the intendant at Arizpe.

No monuments were built, but piles of stone put up to mark the places where the monuments should be constructed, and that in the granting clause (R., 278) the intendant cautioned the Indians to "put up and maintain solid monuments of stone and mortar." This has always been the practice in Mexico, and is to-day. There is no evidence whatever that any such monuments were ever put up, and the probability is none were ever put up. Whether they were or not is important in the matter of the identification made by the surveyors in the employ of the claimants.

On December 23, 1806, a petition was presented to the commissioner by the Indians, and BEFORE THE SURVEYS WERE MADE, requesting him to summon certain old residents of the valley and to question them as to the monuments and boundaries of the mission. In this petition the governor of the Indians, for himself and for them, states: "*I know certainly and positively that this mission is bounded in the direction of Hucbabi by the ranch of the Romeroes, the monument of which still exists to-day beyond Yerba Buena, * * * and in the direction of the Potrero the survey reached the point of the marsh.*" He also states the land had been *bought with money* (R., 272). *If bought*, it was not an allotment to Indians under the royal decree of October 15, 1754, cited in these proceedings, though the present disposition of

these lands is such an allotment. *The governor in his application for these lands said (R., 265) the extent and boundaries of the mission lands are unknown, and the commissioner says (R., 267) there were no coterminous owners in any direction except the presidio of Tubac. These statements are very contradictory, to say the least.*

This petition was granted, and on December 24, 1806, January 7 and 9, 1807, three witnesses were examined. (R., 273, 274.)

The testimony of these witnesses has some bearing on the location of the centre. They all testify to the *approximate* location of three monuments and no more—one near the Yerba Buena, on the line of Buenavista or ranch of the Romero, one at the upper point of the big marsh, and one on a flat table-land in the Sonoita cañon. One witness describes this last as the east monument, and another describes it as the south monument, neither of which is really possible.

This last witness further testified that the original titles of the mission lands were in the possession of a "Corporal Eugene," who learned to read and write from them. They must have been in his possession a considerable length of time.

It further appears by their testimony that a Don Manuel Carrera, or Don Manuel de la Carrera, had in his possession the papers or titles of the lands of the mission, those of the ranch of Buenavista or ranch of the Romero, those of all other tracts in the direction of Huebabi and in the valley of the Potrero. If such statements were true, there were other lands, then, near Huebabi

and in the valley of the Potrero besides those belonging to the mission of Tumacácori. The mission of Tumacácori did not own all the valley of the Potrero nor even all the valley of the Santa Cruz in the neighborhood of Huebabi, consequently it could not be subject to sale as temporalities.

These witnesses testify as to the possessions of the mission held under the titles said to have been in the possession of Don Manuel de la Carrera and declared to have disappeared after his death, and state that the western monument was at the upper point of the big marsh (this fixes approximately the west center monument of the *estancia*); the eastern monument in the testimony of one witness, and the southern in that of another, was on a flat mesa or table-land in the Sonoita cañon, and the third beyond Yerba Buena, in the line of the ranch of the Romero. Not a word is said about the north cardinal monument.

The claim is made for 9,515.8 acres, or 2.19 *sitios*, as the *fundo legal* of Tumacácori, and for the *estancia* 63,730.9 acres, or 14.6 *sitios*. These areas are obtained by ignoring the measurements alleged to have been made by surveyor Manuel Leon, in April, 1807, and by ignoring the location of natural objects evidently well known then and well known at the present time; also by ignoring the order of Intendant Conde, dated on December 17, 1806 (R., 266-267), wherein it is stated, "besides the four leagues, there shall be adjudicated to them an *estancia* for stock of the larger kind, which shall include AT THE MOST TWO SITIOS, in the place most convenient to those natives." This limitation was exceeded by 12.6 *sitios*.

In 1892 Mr. Roskrue purports to have made a survey of this grant, the plat of which is found in the record (R., 6), wherein he estimates the area for the *fundo legal* of Tumacácori at 9,200 acres and the *estancia* at 72,150 acres.

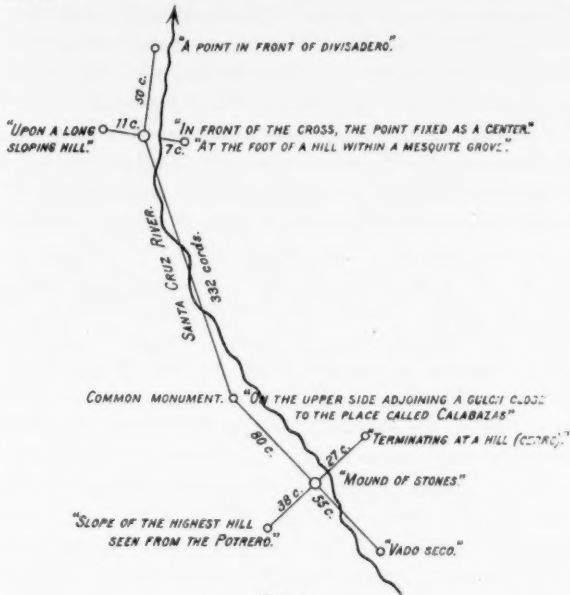


FIG. A.

The surveys of this grant, made by Leon in 1807 and by Mr. Bonillas in 1895, when examined with reference to the testimony of the same given by Mr. Bonillas (R., 102), must impress one with the fact that the old Mexican surveyors were quite as accurate as the modern Mexican "*perito agrimensor*."

Figure A is an unscaled sketch of the lines purporting to have been actually run by Leon in 1807, at the end of which lines should appear the natural objects called for, together with the monuments or piles of stone; if the latter exist as of 1807, they are about the only things the Indians are not charged with demolishing, and from the photographs of them contained in the record (p. 284), lapse of time and the destructive hand of the Apache have added beauty and distinctness, if not importance.

The foregoing sketch shows the only lines of the Tumacácori, Calabazas y Huebabi private land claim, that purport to have been actually run and measured by the original surveyor, Don Manuel de Leon, in 1807.

ANALYSIS OF THE SURVEY OF THE TUMACÁCORI, HUEBABI Y CALABAZAS GRANT IN ARIZONA, MADE BY LEON IN 1807.

The survey of the Tumacácori was all made on January 14, 1807, the center or starting point being taken at a point in the burying ground, "in front of the cross, the point fixed as a center." (R., 269.)

From this point, marked on the accompanying sketch, Fig. A, fifty cords of fifty Castilian varas each were measured "north and down the valley," and terminated "at a point in front of the *divisadero*" (lookout hill) on the south boundary of the *presidio* of Tubac. (R., 269.)

From the same center point "in front of the cross" three hundred and thirty-two cords were measured south, upstream, terminating on the upper side of the tract on a gulch close to the place called Calabazas. (R., 269.)

It is contended by the Government that the termination of this measurement was on the upper side (up the river) of the *fundo legal*, and not the upper side of any one of the many gulches near Calabazas; and by Calabazas is not intended the ruins of the church of the same name, but the tract of land, formerly the *sitio*, of that name.

The surveyor returned to the same center point "in front of the cross" and measured seven cords eastward, NOT FROM THAT CENTER POINT but from the river, which lies to the east of the center point a distance not given. The seven cords terminated "at the foot of a hill within a *mezquite* grove." The distance from the center point "in front of the cross" to the point "at the foot of a hill within a *mezquite* grove" is not given; hence the length of this line is not known. (R., 269.)

From this same center point "in front of the cross" eleven cords were measured west and terminated "upon a long sloping hill." (R., 269.)

This completed the survey of the "*fundo legal*" of the Tumacácori, as shown on Fig. A herewith.

No side or end lines were surveyed and no corner monuments were built or described.

But the side lines of this survey, following the law and custom of Spain in such matters, should run through the outside points and be parallel, respectively, to the lines actually surveyed.

The actual distance from the center "in front of the cross" to the point "at the foot of a hill within a *mezquite* grove," as located by claimants, is 25.37 cords.

Assuming this to be the correct distance actually measured January 14, 1807, the area surveyed for the "*fundo legal*" of the Tumacácori would be 1.38 *sitios* or square leagues, which is 38/100 of a *sitio* in excess of the amount allowed for Indian towns by Law VIII, Book VI, Title III, Compilation of the Indies, as follows:

Law VIII.—That Reductions be made with the conditions of this law.

The sites on which Towns, and Reductions are to be established, shall have sufficient water, land and timber, entrances and exits, and tillable lands, and commons one league in length, where the Indians can keep their stock, without becoming mixed with other stock belonging to Spaniards.

The survey of the Calabazas y Huebabi under the name of *estancia* or pasture grant was made January 14 and 15, 1807.

The center or starting point was "the meadow by the river side, * * * at which point I ordered a mound of stones to be placed." (R., 270.)

From this "mound of stones" eighty cords were measured north, "terminating at the same monument fixed to the agricultural lands, the same being in one body." (R., 270.)

From this same "mound of stones" fifty-five cords were measured south, "terminating on the very slope which descends into the lowland or water course that runs toward *vado seco* (dry ford or crossing)." (R., 270.)

From this same "mound of stones" twenty-seven cords were measured east, "terminating at a hill (*cerro*)" (R.,

271), where it was impossible to proceed further "*por lo muy fragoso é inasesible de montes escarpado de Cerros*" (R., 249), that is, "on account of the great roughness and inaccessibility of the timber and the precipitousness of the hills." The translation of this passage by the words, "on account of the ruggedness of the country" (R., 271, line 23), is incorrect.

The pile of stones at the end of these twenty-seven cords was placed "at the foot of said hill (*cerro*) of San Cayetano." (R., 271.)

From this same "mound of stones" thirty-eight cords were measured west, "terminating on the slope of the highest hill seen from the Potrero," at which was placed another pile of stones. (R., 271).

"*Potrero*" was the name of the *Cienega grande*, or big marsh.

This completed the survey of the Calabazas and Huebabi, known as the *estancia* or pasture grant.

No side or end lines were surveyed and no corner monuments located or described.

The area surveyed for the *estancia* or pasture grant, as comprised in these monuments, is 87/100 of a *sitio*. Claimants have surveyed and claim 63,730.9 acres, equivalent to 14.6 *sitios*.

The survey of these two tracts is shown on Fig. A herewith. No more surveying was done than is laid down on that sketch.

MR. BONILLAS'S SURVEYS.

An analysis of Mr. Bonillas's survey, in connection with his testimony (R., 102 *et seq.*), will show his disregard of the courses and distances and natural objects mentioned in the survey of Leon of 1807, although he claims to have made the survey, disregarding the courses and distances, but being governed by the natural objects called for. From his testimony it is apparent that he has had sufficient experience to state that in perhaps a thousand or more cases where he had investigated the courses and distances of lines he may have found five or ten that agreed with the calls of the title papers in courses and distances (R., 104), and that to his knowledge every one of his surveys had been approved and titles issued for the *demasias* whenever that was the object of the survey; that the quantity of land called for in the title papers varied much from the actual quantity as shown by the surveys when approved. In a great majority of cases there was a great excess of land inside of the monuments over the areas called for in the title papers. (R., 105.)

THE FUNDO LEGAL.

In making the survey of the Tumacácori and Calabazas grant he took his notes for the same from the title papers or *testimonio* of the grant. The map which he made from his notes is found in the record. (R., 347.) He had no difficulty in finding the ruins of the old Tumacácori mission church and the graveyard, which was well preserved.

First line.—He tried to find the north center monument, but could not do so (R., 108); it was said to have been halfway between the old mission and the *presidio* of Tubac. He took as a center the little chapel surmounted by a cross within the inclosed graveyard (Photographic Exhibit R.) Not having found the north center monument, when he got in front of the *divisadero*, on the west edge of the valley, he found a very large old monument of loose stones, and on top of the *divisadero* he found a similar monument. The title he had in his possession at the time said that the surveyors did not go any farther north or down the river with the survey on account of meeting the boundary line of the lands of the *presidio* of Tubac, and the two large monuments that he found he had reason to believe were the monuments of the town lands of Tubac, and had been adopted as the monuments of this *pueblo* grant. He described the *divisadero* as a hill which rises above the rest of the low rolling hills which are characteristic of the banks that were about that part of the valley, and that the name was very appropriate, because from its top one could see all around the country, and it was about halfway between Tumacácori and Tubac. He concluded that he would take the *line cutting the two monuments that he found as the north boundary of the lands of Tumacácori.*

The placing of the northeast corner monument on the *divisadero* by Mr. Bonillas simply because he found a pile of stones there is wholly unwarranted by anything in the *testimonio* of title or elsewhere, as Leon did not place or order to be placed any such pile of stones or other

monument. The only pile of stones Leon pretended to have constructed was the one in the valley between the *divisadero* on the one side and the cottonwood trees on the other. (R., 269.)

Second line.—As to the second line of the *fundo legal*, Mr. Bonillas states (R., 109-110) that, standing upon an eminence west of the mission, looking over the top of it at right angles to the course of the valley, he saw a *mezquite* grove and some small hillocks (*lomas*), and as the title papers said that they measured from the river channel to the foot of a hill in a *mezquite* grove to establish the east center monument, he went to the same, and it was the mouth of a little gulch where he found an old monument of loose stones nearly covered up by the erosions of the waters coming from that little gulch. As that answered the description contained in the title papers, he believed it to be the east center monument of the grant. Leon, in order to establish this monument, measured carefully from the bed of the river seven cords, etc. (R., 269.) Photographic Exhibit S (R., 284) was shown and identified as the pile of stones in the *mezquite* grove. I am inclined to think that time and the Apaches did not deal as kindly with this monument as they did with several others.

Third line.—Mr. Bonillas states (R., 110) that the west center monument was described as being about 11 *cordeles* in a westerly direction from the graveyard upon a long sloping hillock, and on top of just such a hill he found a very large monument. Photographic Exhibit T was shown and identified as being this monument, and this photograph is a sufficient criticism of its

ancient construction. The place where this monument was said to have been established in 1807 was called the *mezquite seco* or dry *mezquite* tree. Photographic Exhibits U, V, and W were identified as having the appearance of *mezquite* trees there.

Fourth line.—Mr. Bonillas says (R., 110–111) that he went to look for the south center monument. The title papers said that it was 332 *cordeles* to the south along the valley on the upper side adjoining the gulch near the place called Calabazas; that he went to Calabazas, which was quite well known, and south of it there was a gulch which was quite close to the ruins of Calabazas. On the upper or southern side he looked for the monument, but was disappointed that he did not find it, and he thought that just exactly the place where it ought to be. Upon looking at the title papers, however, Mr. Bonillas states, he found there was no mention of a monument having been established there, and that he supposed the description of the topographical conditions of the place was so precise that they did not perhaps deem it necessary to establish a monument, but he could not fail to accept that place as the place called for. Mr. Bonillas's examination of the title papers at that time must have been rather superficial, as Leon, the surveyor, in surveying the first line of the *estancia*, says that in running towards the north there was measured eighty cords, the line terminating at the same monument to the agricultural lands, the same being in one body (R., 270). Mr. Bonillas says further that he gathered from the title papers that all the agricultural lands in the valley of the Santa Cruz River and those adjoining it and a few *cordeles*

to the east and west of the valley were intended to be included, and he determined to make a survey so as to take in all these lands literally, just exactly as called for in the title papers, and he established a series of trigonometrical stations on both sides of the valley; that he made a complete triangulation of those lands, and while he was going around with his helpers putting up his trigonometrical flag stations he noticed on the edge of the valley just where he would make a survey in accordance with the calls of the title papers monuments on both sides which with but very few exceptions were old, and there were between 33 and 34 of them in all. In his cross-examination (R., 127) in relation to these station monuments, he states that he does not think the Mexican surveyors put them up, but his theory is that the natives monumented their lands along the edges of the valley to know what they had. When asked as to whether he found other monuments, he stated that he did not reconnoitre in the country at all; that he took all the monuments that could be used to enclose the valley; that he was making his survey, and was going to points he *needed to go to*; on the west line of the valley his stations with perhaps two exceptions were old monuments, but he did not believe they were established by the surveyors in 1807.

THE ESTANCIA. (R., 112-121.)

The center of the *estancia* is said to have been established in the lowland of the riverside at the place called Huebabi; it was not at the old mission of the valley, but below, at a place well known as Benedict's ranch. The

place established as a center is about a mile northwest from the ruins of Huebabi. Photographic Exhibit X was shown and identified as a monument built by himself there. The description in the title papers would be answered by almost any point in front of that (the ruins), and so he chose this point in the meadow close to a very noticeable prominent clump of cottonwoods.

First line.—Mr. Bonillas says (R., 112, 113) that the title papers called for the north center monument of the *estancia* as exactly the same point as the south center monument of the agricultural lands, and that the agricultural lands and the lands for the *estancia* formed one body, and he took the same point as the north center monument of the *estancia*.

Second line.—He says (R., 113), that the south center monument is said to have been established on the slope which descended into the lowlands or water course that runs toward the *vado seco* ahead of the town or ancient mission of Huebabi. The point in the Santa Cruz River called *vado seco*, or dry ford, is well known. He says he went up the water course and looked for the monument on the edges of the valley, and there and right close to the place where the old trail used to pass, and on the slope extending into the water course which runs to the *vado seco*, exactly in accordance with the description, he found a very old monument of loose stones, a photograph of which he identifies as Exhibit X. Photographic Exhibit Z he identifies as the *vado seco*. As Mr. Bonillas built the monument in Photographic Exhibit X recently, and in a country so exposed to the elements

and the Apaches as that must have been, we are a little incredulous as to whether or not the monument in Exhibit Z was built in 1807 or not. At least Mr. Bonillas did not take this as the south center monument of the survey of the *estancia*, but concluded to go about three miles further south (R., 114), and he attempts to justify this action on the testimony alleged to have been taken by Leon on December 24, 1806, and January 7 and 9, 1807 (R., 273, 274), upon the complaint made by the governor of the Indians claiming the lands as far as Yerba Buena by purchase. (R., 272.)

This complaint was directed to Don Manuel Leon. It appears from the dates that the concession was made by Conde on December 17, 1806 (R., 266); that Leon qualified on January 13, 1807, and announced the fact to the Indians that he would proceed to the measurement and survey of the said mission of Tumacácori (R., 269). On the same day Leon certified that he inquired what individuals were owners of land adjoining, and being informed that there were no *colindantes* in any direction save the *presidio* of Tubac, he ordered the same to be included in the proceedings. (R., 267.) On the same day those who were to assist him in the survey were appointed. (R., 267, 268.) On January 14, 1807, he states that he proceeded to the mission with his assistants and five residents for the purpose of commencing the measurement of the lands pertaining to the mission, etc. (R., 268.) The field notes of the survey of the *fundo legal*, commencing on January 14, 1807, are fully set forth. (R., 269-271.) Not one word is mentioned in these formally concluded proceedings by Leon that the line from the center

of the *estancia* to the *vado seco* was to be extended any farther, or that there was such a place in existence in that country as Yerba Buena; yet the petition dated December 23, 1806 (R., 272), and the affidavits dated respectively December 24, 1806 (R., 273), and January 7 and 9, 1807 (R., 274), are now referred to as authority for this extension, when, as a matter of fact, they are dated prior to Leon's qualification and prior to his having any authority to participate in the matter at all. One may well be excused for doubting seriously the original existence or truth of these affidavits, as no mention of them was made in any of the official proceedings by Leon, all of which occurred subsequent to their alleged date of execution. Photographic Exhibits A 5, B 5, and C 5 represent views of the south center monument, which has evidently been reconstructed.

Third line.—It may be well to state here that Mr. Bonillas found some difficulty in justifying the location of the east center monument, and only succeeded in doing so by ignoring the distance and the natural objects called for in the title papers. He states (R., 114) that the monument is described as having been erected at the foot of that side of the Cerro San Cayetano which looks toward the south, and that the survey was not extended farther east on account of the roughness and inaccessibility of the country, and for the further reason that the grantees petitioned the persons who were making the survey to add on the western or *potrero* side the rest of the lands to which they were entitled on the east. It does not appear by anything Mr. Bonillas has stated or anyone

else just what these people were entitled to. He says that the Cerro San Cayetano is known as a range of mountains which lies almost east of the starting point of the lands of Tumacácori, and so he concluded it must be a mistake, and he was further led to that belief by the fact that they are alleged to have run thirty-seven *cordeles* easterly from Huebabi, and that the measurement terminated at a *cerro*, and further along in the field notes it is stated that they could not go ahead on account of the roughness of the country, and they returned to the center. He said it was his opinion that the Cerro San Cayetano was not meant, because that would be an absurdity; that the Cerro San Cayetano was a little west of north and quite a distance from Huebabi; that the south line of the agricultural lands and the north line of the *estancia* lands was quite a distance south of the Cerro San Cayetano. At this point Mr. Bonillas again fell back upon the testimony of the three venerable Mexican witnesses alleged to have been taken before Leon in December, 1806, and January, 1807, before he had any official connection with the matter at all. (R., 117.) Based upon the testimony of these three witnesses, and concluding that the original surveyor had made a mistake, Mr. Bonillas undertook to rectify the same in his survey by hunting for another hill upon which he could find a pile of stones, and, as usual, he was successful, although he was compelled to go east of the center a distance of about five miles instead of about one mile or thirty-seven cords. Under the circumstances it is hardly conceivable how the survey could have been terminated and the remainder, to which they were legally entitled, could be given

them on the west or *potrero* side. Photographic Exhibit E 5 was shown and identified by the witness as the *cerro* at the foot of which was established a monument, and Exhibit D 5 is the monument which he established as one of his trigonometrical points. (R., 118, 119.)

Fourth line.—Bonillas says (R., 119–120) that in looking for the west center monument, which is described in the title papers as being situated on the fall (*caida*) of the highest hill that could be seen from the *potrero*, he could not see the *potrero* from the center monument of the *estancia*, but by going west, in a direction at right angles to the valley, there is a gulch that runs to some high lands lying between the valley of the Santa Cruz and the valley of the *potrero*, and by following this gulch up you come to the highlands, and then another gulch runs toward the *potrero*, and then these rolling hills (*lomerio*) can be seen extending to the west; going down the gulch is the *potrero*, and following to the west he came to the highest *loma* described in the title papers. On top of this there was a large monument and on the *caida* or slope was another monument, and this latter he considered as the west center monument of the *estancia*; that this *loma* was quite noticeable, arising above the rest of the rolling hills. Photographic Exhibit G 5 was shown and identified as the monument which stands on top of the *loma*, with Mr. Bonillas's flagstaff in it. The monument on the slope was identified in Exhibit H 5. Mr. Bonillas further justified his selection of this point as a monument by the testimony of the three ancient witnesses referred to before. He stated there were other monu-

ments around the Cienega Grande and identified them in Exhibit I 5, which is a very excellent photograph of a monument evidently of modern construction, and Mr. Bonillas's credulity is to be wondered at after his long and ripe experience in surveying Spanish and Mexican land grants and in the search for and discovery of ancient landmarks and monuments.

In attempting to work out a correct location of the *fundo legal* and the *estancia* it seems that little or no credence or attention was given to the recitals contained in the instrument of 1807, which formed the basis for the grant of 1844. The result of the examination in chief of Mr. Bonillas, a summary of which has been attempted, reflects more credit upon his ability than it does upon his candor. The *fundo legal* of the *pueblo* of Tumacácori he assumes to have been originally four SQUARE leagues, and yet his examination upon the ground, and the results thereof indicated in his survey, negative his conclusions. The area contained in the *fundo legal* was a little more than two leagues, although it does not appear but that the boundaries upon the eastern and western sides thereof could have been so located as to bring within its area four square leagues. He stated (R., 123) that he "never followed courses or distances given in these title papers. I go to the topographical points described. I lost a good deal of time when I did that when I was first getting experience in surveying." His explanation of the manner he made his survey of the *estancia* is but an illustration of the extreme unreliability of his survey and location of the boundaries of the grant.

It is impossible for counsel to brief the testimony of Mr. Bonillas with any satisfaction to themselves ; therefore, the title papers (from which alone Mr. Bonillas says he obtained his data), the conclusions from his survey, his map, the wrongful location of the Cerro San Cayetano, all admonish counsel for the Government to refer the court to his entire testimony, to be considered with reference to the recitals contained in the field notes of the original survey of 1807, and his attempt to justify his disregard of both the natural objects and distances called for in the title papers upon the basis of the testimony of three witnesses, the integrity of which is successfully refuted on the face thereof and by the date of the affidavits themselves.

It is clear by the testimony of Colin Cameron, more interested than Mr. Bonillas in sustaining this and every other private land claim in Arizona, and who has, by his own testimony, been instrumental in the reconstruction of more monuments than were destroyed by all the Apaches that ever overran the country, that he dare not attempt to sustain the ancient origin of a number of Mr. Bonillas's monuments. In the face of all the testimony Mr. Bonillas could not justify the location of the east center monument of the *estancia* at a round bald hill five miles east of the center monument, when the grant clearly called for a distance of 37 cords, except to say that the original surveyors did not know what they were doing ; that they were mistaken, and their location was an absurdity. He can only justify, after thoroughly identifying the topographical features of the country at the *vado seco*, at the

place he expected to find it, his location of the south center monument of the *estancia* three miles south thereof and south of the Yerba Buena, by the testimony of the three ancient witnesses several times before referred to, whose evidence and the location of the point of Yerba Buena, it should be borne in mind, nowhere appears in any of the proceedings taken by Leon, the original surveyor, nor does it appear in the petition for or granting clause of the grant of 1807. This monument of the *estancia*, which was limited to two *sitios* at most, can be as well sustained and justified as many of the other monuments so readily found in company with Colin Cameron and his associates.

Another peculiarity of this survey will be observed in the offshoot on the east line of the *fundo legal* just south of the San Cayetano Mountains, and north of the line between the *estancia* and the *fundo legal*, by which Mr. Bonillas seeks to take in the lands up the Sonoita Creek as far as the narrows of the *cañon*, and this he does based upon his construction of the title papers as to what was intended to be granted and *intended* to be surveyed by Leon. (R., 125.) Whatever emergencies the claimants in this case may have been subjected to in order to sustain their claim, based upon the integrity of the examination upon the ground, there can be no excuse for the location of the *fundo legal* of the *pueblo* of Tumacácori for nine thousand acres and of the *estancia* for over 63,000 acres, which was limited by the granting officer to two *sitios* (8,677 acres) at most; and especially is this true when a surveyor, who has surveyed as many as a thousand of these claims, can give no better justification

for it than is contained in his testimony, that he paid no attention to the courses and distances, and it is evident from his location of the east center monument of the *estancia* that he paid no attention to the natural objects called for. In commenting upon his testimony, it may be said that as a surveyor he was equal to the emergencies demanded of him by the claimants.

If there was any limitation to be placed upon this sale of 1844, and the amount of land conveyed thereby was to be limited to an exact area by virtue of the sale of 1807, then the survey of Mr. Bonillas and the claim asserted can not be recognized, because, under the sixth article of the treaty of Mesilla (Gadsden purchase), the same had not been located at the date of the treaty. (*Ainsa v. U. S.*, 161 U. S., 208.)

If the lands attempted to be conveyed by the grant of 1844 were temporalities of the church, they must have had some definite and supposedly known area. Mr. Bonillas in construing (as he supposes) the legal effect of the recitals contained in the title papers, in order to account for his peculiar and remarkable survey, demonstrated that his legal knowledge failed him at a most critical point, as it can hardly be contended that the lands alleged to have been acquired by the pueblo of Tumacácori by purchase were temporalities of the church.

We find endorsed on the *titulo* of 1807 (R., 279) an alleged agreement between Ramon Liberos, a priest, in the name of the *pueblo*, and Leon Herreras, the alleged grantee of the Sonoita grant, by which a dispute as to the boundary between the lands of Tumacácori and Herreras (Sonoita grant) was settled. This agreement appears to have been

entered into before Don Elias Gonzales, commandant of the *presidio* of Tubac. The instrument states that they requested that the agreement be entered at the end of the *expediente* in possession of the interested parties as testimony in the matter. The date of this agreement is given as January 10, 1823. Neither the *titulo* of the Sonoita grant, produced as evidence of title in the case of *Ainsa v. U. S.*, No. 27, nor the *expediente* in the archives disclose such an agreement, and in the very nature of things could not, for at the date thereof, January 10, 1823, the grantee of the Sonoita grant had no evidence of title and obtained none until the issuance of title by Manual Riesgo, commissary-general, May 15, 1825, more than two years after the date of this alleged agreement and after the *pueblo* of Tumacácori had been abandoned.

Mr. Bonillas in making his survey construed the clause in the concession of 1807 by Conde, the intendant, that "the said commission shall measure to the said nation one league to each wind or the four leagues where it may best suit them" (R., 266), to mean four *square* leagues, although he seems to have been unable to survey more than two and nineteen-hundredths leagues as an area for the *fundo legal*.

Indian towns were limited to one square league. (Laws of the Indies, VIII, Book VI, Title III, *supra*.)

The manner in which surveys were to be made in New Spain has been defined by Escriche and also by Galvan as follows :

HOW SURVEYS WERE MADE IN NEW SPAIN (MEXICO).

SITIO DEFINED.

[Escriche, Appendix, page 210, edition 1888. Also Galvan, Ordinances on Land and Water.]

In regard to the names and classes of lands, the following should be borne in mind :

There are three classes of lands, according to royal ordinances, the first of which are called *pan sembrar*, the second are called *pan coger*, and the third *pan llevar*. *Pan sembrar* lands are those for chance wheat ; *pan coger* lands are those that depend on the seasons, and *pan llevar* lands are those that can be irrigated—that is, that have water.

Each class of these lands has different prices, which are to be determined according to their location, qualities, distance, and circumstances, and the same is to be understood of the *sitio de ganado mayor*, *menor*, *criadero* or *caballeria* of land.

Besides these three classes, there are other lands that only serve for pasturing stock, and these are hillocks, mountains, and ravines.

Lands that are under cultivation—that is, subject already to the plow—in America are called *pan llevar*, in contradistinction to breeding and mountainous lands, as no wheat is planted in the rainy seasons on account of rust.

In regard to the method to be observed and followed in the survey of a *sitio de ganado mayor*, *menor*, *criadero*, or *caballeria* of land, it shall be as follows : If it is a *sitio de ganado mayor*, the first thing is to find the center, which shall be determined from its boundaries. Being at said center, there are to be measured therefrom, running east,

two thousand five hundred Mexican *varas*, which are fifty cords of fifty *varas* each. Returning to said center, there are to be measured therefrom, running west, another fifty cords, so that they have in length, from east to west, one hundred cords, which are five thousand *varas*. Returning again to said center, there are to be measured therefrom, running north, fifty cords, which make one hundred from north to south, the cord starting from the center for the four points mentioned.

But, in order that the measurements may be equal, the north must be determined and followed by the compass and from it the four winds, that the cord may be carried directly from north to south and from east to west, four monuments being placed, one at the end of each measurement, and to measure the four sides from them, proceed in this manner:

Being on the east side where the monument was placed, thence running north, there are to be measured fifty cords to where said *sitio* forms a corner or right angle. Having returned again to said monument, thence running south, there are to be measured another fifty cords to where it makes an angle, the east side being one hundred cords long.

Being at the other monument on the west, the measurement shall be made in the same manner, so that it shall start from the monument for the corner. Following the same method with the other monuments to the north and south, the measurements shall start so as to meet and form a right angle, until the figure closes; so that when a *sitio de ganado mayor* has been measured with a cord of fifty *varas*, it will be found to be as long as wide—that is, one hundred cords long by as many more in width, which makes five thousand Mexican *varas* or three thousand Solomon's paces, as has already been stated,

and from the center to any one of its sides there will be fifty cords, which is the half of a measured league. Whoever goes around this *sitio* will have walked four leagues, all of which we will better explain by means of Fig. 18, as follows:

This square represents a *sitio de ganado mayor*, the center of which is indicated by a heavy dot or small circle. Being then at the center fifty cords shall be measured therefrom due east, and at the point where the measurement terminates monument A shall be placed. Returning to said center a like measurement shall again be made, carrying the cord due west, and where it ends monument B shall be placed, so that there shall be from A to B one hundred cords.

Being at said center fifty cords shall be measured therefrom due north, and where the measurement terminates monument C shall be placed. Returning to the center a like measurement shall be made due south, and where it ends monument D shall be placed, and there shall be one hundred cords from C to D.

After this, being at monument A in the east side, fifty cords shall be measured therefrom from south to north—that is to say, due north. Having returned to the same monument, a like measurement shall be made from north to south and the east side EF shall have one hundred cords. This operation shall be performed in absolutely the same manner to measure the west side, HG, without other difference than to begin the measurement at the west monument, B, and said side shall have one hundred cords.

Being at the north monument, C, fifty cords shall be measured therefrom due east. Returning to the same monument, a like measurement shall be made

due west and the north side, EH, shall have one hundred cords and shall make right angles at H and E with the west and east sides.

If, when at the south monument, D, a like operation is repeated absolutely in the same manner, the south side, GF, will have one hundred cords, will make right angles at G and F with the west and east sides, the figure will close, and therefore the measurements will be completed.

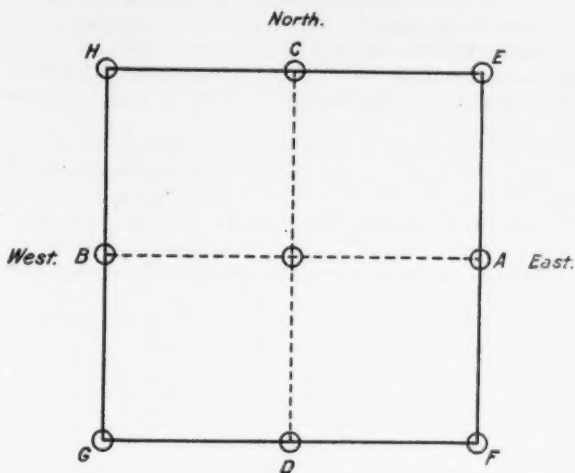


FIG. B.

SITIO DE GANADO MAYOR DEFINED.

The figure of a *sitio* for a stock farm is a square, each of the four sides of which has *five thousand Mexican varas*. Two of these sides should have a direction from east to west, and by a forcible consequence

the other two should be situated from north to south. The distance there should be from the center of said *sitio* to each one of its sides, running directly toward the points of the horizon, which are called cardinal, and are east, west, north, and south, is *two thousand five hundred varas*; that which should be measured from the same center to each one of the four right angles of said *sitio* should have *three thousand five hundred thirty-five and a half varas*, and that which should be measured from either of its angles to the other angle opposite should be *seven thousand and seventy-one varas*. If, in these measurements, use is made of the cord of fifty *varas*, each one of the sides of the *sitio* for a stock farm should have *one hundred cords*; from the center to each one of said sides there should be *fifty cords*; from the same center to each one of the angles there should be measured *seventy cords and thirty-five and a half cords*, and from one angle to the other opposite there should be *one hundred and forty-one cords and twenty-one varas*.

The area or surface of a *sitio* for stock is *twenty-five million square varas*, which results from squaring the number of *varas* which one of its sides has—that is, multiplying the number 5,000 *varas* by itself.

NOTE.—A *sitio* contains 4,338.464 acres.

RECORD.

The grant of 1844 appears to have been executed at Guaymas, April 19, 1844, at which time there was nothing in the archives indicating the extent of the lands which had been granted in 1807 to the *pueblo* of Tuma-cácori as *fundo legal* and *estancia*, and nothing appears to be in the archives to show the fact that Ignacio Lopez executed the conveyance of 1844. The record book

(*Toma de Razon*) for that year was there then and is there now; a book which had been carefully made up and each sheet thereof properly authenticated, and the whole properly certified at the date of binding in 1831. This book answered the purpose of such record of the issuance of grants as was customarily kept from 1831 to 1849, and it nowhere appears that any other was ever made up or used during that time. It is true that no entry of the fact that any grants were issued during the year 1844 appears, but this does not of itself establish the fact of the existence of another book and its use for the same purpose during that year. Grants issued immediately prior and subsequent do appear to have been noted, and the formality of its original compilation and authentication tends strongly to negative such a conclusion by counsel for appellants that the same was afterwards made up of loose leaves.

Another very significant fact appears in the absence from the archives in 1855 of the grant to the *pueblo* of Tumacácori, made in 1807, and the so-called grant to Aguilar of 1844, at which time a list of the *expedientes* was made for the commissioner of the national government under the celebrated decree of Santa Anna of July 7, 1854 (*Reynolds*, 326), so often referred to and discussed before this court. If on February 8 and 10, 1857, when Tapia and Gutierrez were overhauling the accounts of the treasurer, these present documents or either of them were found, the question arises, How did they get there and from what source did they come? Tapia in his testimony (R., 45) identified the instrument of 1844, produced on the trial as evidence of title, as the same

instrument examined by them at that time. Neither at the date of the attempted sale by Lopez of the *pueblo* lands of Tumacácori as temporalities of the church, nor subsequently, was there anything in the archives showing the fact that the *pueblo* ever held title to any of this land. The sale by Lopez to Aguilar at Guaymas in 1844 never became a part of the archives, and at the date of the treaty, December 30, 1853, and on January 26, 1855, nothing appeared to show the fact of its existence, and the only evidence that the *expediente* ever existed is to be found in the letters of Tapia and Gutierrez to the treasurer-general, dated February 8, 1857 (R., 240) and his unsigned reply of February 10, 1857 (*Ibid.*).

Examining the correspondence leading up to the letters of Tapia and Gutierrez, it appears that Governor Pesquiera on January 15, 1857, directed a letter to the treasurer of the State of Sonora, stating that Francisco Gandara had in the May previous withdrawn as bondsman in favor of the *contador* of the treasury, Don Manuel Arvisu; that by reason thereof an examination of the treasury was necessary and he had appointed José Toribio Gutierrez to make the examination and inspection, commencing with the day the treasurer, Don Antonio Morales, was called to take charge of the American custom-house, and requesting that there should be placed at his disposal the funds, books, and archives of the office. (R., 235.)

An unsigned reply to this communication is translated in the record (Exhibit 4, pp. 237-8), in which is acknowledged the receipt of the same, promising to comply with

the order, and criticising the attempt of Francisco Gandara to be released from the bond ; stating also that José Aguilar, who was governor at the time of the withdrawal, had not taken up the matter because of the revolution. This communication is dated January 21, 1857.

An unsigned letter to the superior chief of the treasury of the state, of the same date, states that Gutierrez had presented himself for the examination (R., 238); following (R., 238) is an unsigned instrument, of the same date, transmitting the whole thereof to his excellency, by Toribio Gutierrez.

The next communication seems to be one directed by Gutierrez, the commissioner of the Government, to the *contador* of the treasury, Don Manuel Arvisu, suspending him from office and appointing Don Eufemio Tapia in his stead, dated February 4, 1857. (R., 236.)

On February 8, 1857, a letter was written by Gutierrez and Tapia to the *contador*, Don Maria Arvisu, stating that in order to complete their report it was necessary to have before them the *expedientes* of the ranches of Tumacácori, Calabazas, Cocospera, and San Pedro de Arivaca, and requesting that they be transmitted to them. (Exhibit (1), R., 240.)

Replying to that letter is an unsigned copy of a letter, dated February 10, 1857, directed to the treasurer-general of the State, purporting to transmit the *expedientes* of the measurements of the ranches La Casita, Calabazas, Tumacácori, and San Pedro de Arivaca, stating that that of the Cocospera was not transmitted, because it could not be found in the office ; but there was found in

the book of *toma de razon* an entry in 1833, which was copied by the treasurer-general, stating that on the 14th day of August title of a grant of four *sitios* of land had been issued in favor of the natives of Cocospera and Dolores, which entry was signed by Milla. (R., 241.)

Following this is an unsigned statement, as follows: "Don Toribio takes with him the following *expedientes*, for which Don Eufemio Tapia must give receipt: Casita, Tumacácori, and Calabazas, Calabazas, Tumacácori, Arivac. (R., 241.)

It is apparent by the communication of February 10, 1857, that the book of *toma de razon*, containing the entry of the Cocospera grant in 1833, existed in the archives; this is the same book that existed in the archives and is now there. It is clear from the evidence that the *expedientes* of the Tumacácori and Calabazas grant of 1807 and 1844 were not in the archives on July 26, 1855, and were not included in the list made up at that time by the treasurer-general for the use of the agent of the national government, Florencio Monteverde. (See Official Report on the Condition of the Archives, etc., by Special Agents Tipton and Flipper, pp. 2-3.) It is also quite clear that none of these instruments are in the archives now; that none of the documents relating to the grant to the *pueblo* of Tumacácori in 1807 were in the archives in April, 1844; that no note or memorandum of the issuance of this latter grant was made in the book of *toma de razon*.

Although the correspondence of 1857, before referred to, may have some tendency to show the existence in the

archives at that time of the *expedientes* in the Tumacácori and Calabazas grant, yet it is not sufficient to meet the requirements of the sixth article of the treaty of Mesilla. Considering all the evidence in relation to the record of this grant, it seems clear that the importance of its record was not understood until some time subsequent to the treaty of 1853 (Gadsden purchase), and it is contended on behalf of the United States that the same was not duly recorded in the archives of Mexico prior to the 25th day of September, 1853.

It is contended by appellants that although the book of *toma de razon* for the years 1831 to 1849 exists, yet as there are no entries of the issuance of titles for the year 1844, and as there is other evidence on file in the archives of the issuance of such titles, there must have been another book for that year, or this book was afterwards made up of what were originally loose leaves, and that those for the year 1844 were omitted and have been lost or destroyed. The claim of the existence of archive evidence that titles were issued in the year 1844 is incorrect.

Mr. Rochin compiled a catalogue in 1889. We have examined the same and find that although there are thirteen instruments in the archives showing some proceedings in 1844, still in no instance do they show the conclusion of the proceedings and issuance of title in that year so as to entitle the same to be entered in the book of *toma de razon*. The instruments showing some steps taken in 1844 are as follows:

Bacochibampo.—A house, lot, and three water-raising machines belonging to the nation "adjudicated" in 1844

to Antonio Bustamante, inside of the municipality of Guaymas. (Rochin's Catalogue, p. 14.)

Bisam.—Denounced in 1844. Title issued in 1846. (*Ibid.*, 16.)

Cieneguila.—Survey for *demasias* made in 1844, order for title to issue, but no evidence that it was issued. Owner, Francisco Alexandro Aguilar. (*Ibid.*, 25.)

Chiltipines.—Denounced in 1844. Title issued in 1847. (*Ibid.*, 26.)

Candelaria.—Suit started in 1844 between two parties over title issued in 1841. (*Ibid.*, 29.)

Moradillas.—Denounced in 1844. Adjudicated in 1845. No *Toma de Razon*. (*Ibid.*, 61.)

Pilares.—Denounced in 1844. Does not appear that title was issued. (*Ibid.*, 75.)

San Antonio.—*Demasias* denounced in 1844. No evidence that title was issued. (*Ibid.*, 115.)

S. Francisco del Gito.—Denounced in 1844. Surveyed in 1846. No evidence of issuance of title. (*Ibid.*, 116.)

Santa Rosa.—*Expediente* made up in 1844. Does not appear that title was issued. (*Ibid.*, 117.)

In regard to sale of temporalities in *pueblo* of Seris, 1844. (*Ibid.*, 117.)

S. Jose de las Taraises.—Denounced in 1844. No evidence that title was issued. (*Ibid.*, 127.)

Tetacomriate.—Denounced in 1844. Adjudicated in 1845. No evidence of issuance of title. (*Ibid.*, 147.)

POWER.

POWER TO SELL OR DISPOSE OF THE LANDS OF THE NATION, WHETHER TEMPORALITIES OR VACANT PUBLIC LANDS, WAS CONFERRED ALONE UPON THE BOARD OF SALES.

In conferring jurisdiction upon the judicial branch of the Government to pass upon the question of the obligations assumed by the United States under the treaties of Guadalupe Hidalgo and Mesilla (Gadsden purchase), Congress prescribed the rules and limitations under which this power was to be exercised. Section 13 of the act creating the Court of Private Land Claims provided:

First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico or from any of the States of the Republic of Mexico having lawful authority to make grants of land, etc.

It is to be observed that the form and recitals contained in this *título* do not agree with those we have had occasion to examine. It purports to have been made upon the motion of Ignacio Lopez, treasurer of the department of Sonora. In the preamble and granting clause it is stated that under authority of the decree of February 10, 1842, which provided for the sale, on account of the critical condition of the treasury, of the properties belonging to the department of temporalities, of which class were the farming lands and lands for the breeding of horses and cattle, respectively, of the four leagues of the depopulated town of Tumacácori and the two *sitios* of the stock farm of the same, the areas, boundaries, and coterminous tracts of which were stated in the proceedings of survey executed in the year 1807, and having

obtained information in relation thereto, said farming and grazing lands were valued at the sum of \$500, as provided in article 2 of the said decree of February 10, 1842.

It is contended on behalf of the Government that these lands were not temporalities of the church.

"*Temporalidades*" is defined in the Spanish Dictionary of Carlos de Ochoa as—

Aggregate of proceeds, and any other profane or worldly things ecclesiastics receive from their benefices or prebends.

Esriche defines the word as—

Proceeds, revenues, or any other profane things ecclesiastics receive from their benefices and prebends, and of which it is customary to deprive them when they contravene the laws; as, for instance, when they authorize the marriage of a minor who has not obtained the consent of his elders.

The Dictionary of the Spanish Academy defines it: "Proceeds or any profane thing which ecclesiastics receive from their benefices or prebends."

The Tribunal of the Inquisition was abolished by decree of the Cortes of February 22, 1813. (Comp. Laws, Vol. I, p. 399, No. 109, by Dublan and Lozano, 1876.)

The Company of Jesus or Order of Jesuits was suppressed by decree of the Cortes of Aug. 17, 1820. (*Ibid*, p. 522, No. 223).

Monastic orders were suppressed and the regular orders reformed by decree of the Cortes of October 1, 1820 (Reynolds, 90), article 23 of which provides:

All the movable and immovable property of the monasteries, convents, and colleges that are now

suppressed, or that may be suppressed hereafter,
* * * are applied to the public credit.

These properties are the temporalities referred to in all subsequent laws on that subject.

The order of the Sovereign Provincial Board of Government, issued on December 18, 1821 (*Ibid.*, 97), provided that the temporalities of the hospitals of the suppressed religious bodies be delivered to the common councils, which shows the relation of this order to the decree of October 1, 1820 (*supra*).

By decree of April 16, 1834, the missions of the republic were secularized, and it became the duty of the governors of the States to define their boundaries. (Reynolds, 185.) This decree shows that the missions were not suppressed, nor was any of the property owned by them to be included within the forfeiture to the government of the temporalities of the church. Article 20 of the decree of February 21, 1820 (*Ibid.*, 93), shows that the missions were not suppressed, but merely secularized.

On May 10, 1829, the department of the treasury ordered that "the property in which consist the funds of the temporalities of the ex-Jesuits and monastics and the rural and urban estates (*fincas*) belonging to the inquisition" be sold at public sale to the best and highest bidder. (Comp. Laws, Vol. II, p. 108, No. 639.) Some consolation is sought from this law, because the same must have been promulgated on account of the various commissaries having rented the public properties belonging to the temporalities. The jurisdiction of the commissaries over these lands in no way indicates their powers over the *vacant lands* that were not temporalities.

On May 31, 1829, the commissariat-general of Mexico published a "list of the urban and rural estates (*finca*s) relating to the temporalities of the ex-Jesuits and suppressed monastics, with a statement of their values, the burdens they carry, and annual revenue." (*Ibid*, p. 117, No. 652.) In this list there is but one property situated in the State of the west, and that is the Hacienda de Masocari and its ranches, near the village of Sinaloa, in what is now the state of Sinaloa. Its value was placed at ten thousand dollars.

The next law we are able to find relating to temporalities is the decree of February 10, 1842, under which the lands involved in this case purport to have been sold in 1844 by the treasurer of the department of Sonora. The decree of President Santa Anna of September 19, 1842 (Reynolds, 241), recognized the burdens existing on rural or urban property of the temporalities, and in order to carry out the same a communication was sent by the president to the governors of the various departments on February 28, 1843 (*Ibid.*, 242), wherein it is directed that the common councils or town corporations should place all temporalities at the disposition of the office of the auditor of temporalities, a bureau of the general treasury department, and that reports should be made to said general treasury, and that there should be included property which had been set aside for the purpose of public beneficence in order that the treasury might make the classification of that which had been set aside therefor, to avoid the fraudulent disposition that might be made of temporal property, all of which matters belonged to the supreme government.

The foregoing review of the laws relating to temporalities covers all that were issued between 1813 and 1844, the date at which Lopez purported to have issued the title in this case.

With reference to the law of February 10, 1842 (*supra*), alleged to be authority for action by Lopez, it appears that if the *fundo legal* and the *estancia* of Tumacácori were temporalities, that law was not complied with in making the sale. Article 1 thereof provides that the boards of sale in the several departments will proceed to sell at public auction to the highest bidder the properties (*fincas*) situated therein that pertain to the department of temporalities. No bid was to be admitted that did not cover the value of the property, the same to be computed from the amount of the leases, which should be construed as the interest thereon at the rate of five per cent. It nowhere appears in any of these laws relating to the sale of temporalities that the value thereof should in any manner qualify or affect the official body authorized to make the sale.

Mr. Lopez ignored and violated the provisions of the law of February 10, 1842, in this, that the land was not sold by the board of sales, but by him; and he cited as authority therefor article 73 of the law of April 17, 1837, which did not authorize him as departmental treasurer to sell and pass the title to the vacant public lands whether they were valued at less or more than five hundred dollars. There is nothing in the law of 1842, pertaining to the sale of the temporalities, indicating that the mode of procedure should be the same as that contained in

the law of April 17, 1837, but it was a law general in its character, directing the boards of sale to sell all the properties of the class designated therein. It is clear that neither the law of April 17, 1837, nor that of February 10, 1842, authorized the treasurer of the department to sell any of the lands of the republic or under its control, whether they were public lands or those that fell within the class designated as temporalities of the church, and this grant is precluded from confirmation under the provisions of section 13 of the act creating the Court of Private Land Claims (*supra*), because the title thereto has not been lawfully and regularly derived from either Spain, or Mexico or any of the States thereof having lawful authority to dispose of the vacant public lands.

It is clear from the recitals in the papers themselves that Lopez knew he had no authority to make the sale of the lands if they were public lands of the nation, and he sought to avoid this very difficulty by arbitrarily classifying them as temporalities!

The lands attempted to be sold formerly belonged to the town of Tumacácori, an Indian village or *pueblo*, which, as fully appears, had been abandoned for a number of years, probably since about 1820. Upon its abandonment as a *pueblo* the lands which had been assigned to the community as a body returned to the great body of the public domain, the *jus disponendi* of which always remained in the nation, and the only laws applicable to the disposition of the whole or any portion of it were the laws of the nation in relation to the disposition of its vacant public lands. It is not contended by the claimant

that this sale in any manner conformed to the requirements of those laws or was made under them, which laws have been quite fully discussed in a large number of other cases before this court from the Court of Private Land Claims.

The law of February 10, 1842, did not prescribe any regulations for conducting the same, except that the sale should be made by the "board of sales in the several departments" (Reynolds, 239), nor did it provide that the value of the property should in any way change the membership of the board or dispense with its action as such. This body must have had an official existence at the date of the issuance of the foregoing law, and it seems to follow that the action of Lopez, if taken at the time it purports, can not be sustained as being lawful or regular. With this law recited as authority, it is at least questionable whether Lopez may not be charged with bad faith in failing to have the board of sales perform its duty instead of assuming to himself all the powers and authority in the matter.

It is inferentially contended for the appellants that the treasurer of the department could make the sale without the participation of the board of sale, because, by article 73 of the law of April 17, 1837, sales made on account of the treasury exceeding five hundred dollars, "shall be made necessarily by the board of sales." (Ibid., 225.) Hence it must follow that all sales for five hundred dollars or less could be made by the departmental treasurer. This position ignores the mandatory provisions of the law of February 10, 1842, and, if seriously insisted upon, must

result in the abandonment of the theory that the lands were *temporalities*; therefore, the right to confirmation must fail, as it is apparent that the laws in force regulating the disposition of the vacant public lands were in no way attempted to be complied with.

The action of Lopez is attempted to be justified by the law of December 16, 1841. (Reynolds, 238.) This law went into operation on January 1, 1842, only a month and ten days prior to the law ordering the sale by the board of sales in the several departments of the properties (*fincas*) situated therein that pertained to the department of temporalities. It did not abolish the board created by article 73 of the law of April 17, 1837, nor did it modify or change a single power of the same. The office of superior chief of the treasury, created by the latter law, was abolished, and the duties theretofore performed by those officers in the various departments were conferred upon the various departmental treasurers, except such as were assigned to the commandant-general. So far as this litigation is concerned the only effect of this law was to drop out of the board of sale the superior chief of the treasury and impose his duties upon the departmental treasurers; the board continued in existence and could have acted in this instance had Mr. Lopez sought to comply with either the law of April 17, 1837, or February 10, 1842.

The various laws and regulations for sales and purchases that were to be made on account of the public treasury of the nation were briefed and referred to in the court below, and, as all of them have heretofore been

fully discussed in other cases, we content ourselves with a simple summary or index of them for the convenience of the court, with the observation that they disclose a complete, minute, and guarded system, and the radical variances therefrom and violations of their express requirements can hardly be justified upon the idea of good faith.

LAW OF AUGUST 4, 1824 (REYNOLDS, 118).

Classification of general and special revenues.

It has been contended on behalf of the Government that the vacant public lands were not intended to be the object of this law, as the policy of the nation in relation to the same was within a few days declared by the

LAW OF AUGUST 18, 1824 (Ibid., 121).

Colonization law.

The objects and purposes of the nation in respect of its public lands were declared and defined by articles 2 and 3 to be for colonization.

Commencing with the law of September 21, 1824, was the creation of a system, changed from time to time, but always consistent, for the organization and execution of the revenue system of the nation.

LAW OF SEPTEMBER 21, 1824 (Ibid., 123).

Created the office of commissary-general and defined his powers and duties.

It is not believed by counsel for the Government that this law in any way contemplated any jurisdiction over

the vacant public lands, no matter where situate, and if lands can be included within its scope, they were only such as had been appropriated for temporalities and public and governmental purposes, and not the vacant public lands which seem at that time to have been reserved by the law of August 18, 1824, for colonization, either by the states or nation.

LAW OF JANUARY 26, 1831 (Ibid, 151).

Created a general department of revenues.

This department seems to have been located at the national capital and it assumed jurisdiction over the commissariats located in the various States and Territories. Article 13 provided:

The proceeds of national property shall be collected by commissioners under the immediate direction of the general department.

LAW OF MAY 21, 1831 (Ibid., 153).

Created commissariats and commissaries-general.

This bureau, located in the various States and Territories, was in all respects subject to the treasury general of the nation established by the law of January 26, 1831.

REGULATIONS OF JULY 7, 1831 (Ibid., 155).

These regulations were issued under the provisions of article 1 of the law of January 26, 1831.

The general department of revenue, established on January 26, was divided into three sections, under whose charge were placed the different branches of the

treasury. The chief of the first section was first auditor, with jurisdiction of national property. Article 10 provided that the general department should take an exact account of the number, location, value, condition, and present method of administration of all the property and estates of the nation, and should see to the thorough collection of the proceeds thereof.

REGULATIONS OF JULY 20, 1831 (*Ibid.*, 157).

These regulations were additional to those of July 7, and it will be noted that article 126 provided that "all purchases, sales, and contracts made on account of the treasury, whatever be their purpose, shall be made by the commissaries-general, sitting as boards of sale." This board was to be convened only upon the order of the Supreme Government, etc. These regulations furnished a very complete system for the administration of the revenues of the nation, and is the first instance in which the purchases and sales on behalf of the government were required to be conducted by a board of sales.

The political situation of the country had assumed such a state that a change in the form of government commenced in 1835.

LAW OF OCTOBER 3, 1835 (*Ibid.*, 195).

The state legislatures (congresses) were abolished and departmental councils were established.

BASES FOR THE NEW CONSTITUTION, OCTOBER 23, 1835 (*Ibid.*, 201).

These bases divided the country into departments which were to be given in detail in the constitution.

CONSTITUTION OF 1836, DECEMBER 29, 1836 (Ibid., 209).—
LAW OF DECEMBER 30, 1836 (Ibid., 209).

This law made the division of the country into departments. No distinction was made between those subdivisions which had been States and those which had been Territories. The financial condition of the country had evidently become alarming and its credit required strengthening.

LAW OF JANUARY 17, 1837 (Ibid., 210).

Established a national bank for the redemption of copper coin.

By article 3 there was adjudicated to the bank for a redemption fund: "First, all real property of the nation that exists in all the territory of the republic." (This law was repealed December 6, 1841.)

LAW OF APRIL 4, 1837 (Ibid., 222).

Colonization of the lands of the republic.

This law, in our opinion, is the first direct attempt or intention on the part of the national government to permit its vacant public domain to become a part of its revenue system, and was evidently brought about by financial distress.

LAW OF APRIL 12, 1839 (Ibid., 223).

This created what is known as a national consolidated fund, and was practically a mortgage of one hundred million acres of public lands in departments of the Californias, Chihuahua, New Mexico, Sonora, and Texas to secure the payment of the national debt.

On September 15, 1837 (Reynolds, 227), a convention was entered into between the nation and the English bondholders stipulating that the deferred bonds should be received at any time in payment of lands that were found unoccupied in the departments of Texas, Chihuahua, New Mexico, Sonora, and California, at the option of the purchasers, at the rate of four acres of land to the pound sterling. This convention was ratified on June 1, 1839. (Ibid., 232). Prior to that time, however, by the

LAW OF APRIL 17, 1837 (Ibid., 224),

the department of revenue under the new form of government was established, and it is to this law that reference is made in the title papers in this case and particularly to article 73. By this law it is clear the principal officer of the general treasury in each department was designated as the superior chief of the treasury, and on him was conferred the powers and duties formerly exercised by the commissary-general. All of the various officers connected with the department of revenues were subordinate to these superior chiefs. The court below, in concluding its opinion by Chief Justice Reed, seems to cover the ground:

From these various provisions it is manifest that the power to make sales or grants of national lands situated in the States and departments was vested in the treasury department of the nation. But it is equally clear that the exercise of that power was governed by strict rules and regulations emanating either from the department or the chief executive of the nation; and we look in vain for any rule or

regulation which by any possible construction conferred that power upon the officer who in this case attempted to exercise it. It was not conferred by any express provision, nor is it to be inferred from any power that was conferred.

On the boards of sale created under the decree of July 20, 1831, and that of April 17, 1837, alone was this power conferred, and the strict rules and regulations enacted for the government of those boards in the conduct of such sales precludes the idea that any single officer, although a member of the board, could exercise the power. (R., 332-333.)

We believe from all the evidence in the case appellants have failed to bring their claim within the terms of the treaty of 1853 or the law conferring jurisdiction upon the judicial branch of the government.

Respectfully submitted.

JOHN K. RICHARDS,

Solicitor-General.

MATTHEW G. REYNOLDS,

Special Assistant to the Attorney-General.





No. 119.

MAR 22 1898
JAMES H. MCKENNEY,
CLERK

By *of* Atty. Gen.^o (Reynolds) for
U.S. (on mo.)

Filed Mar. 22, 1898.

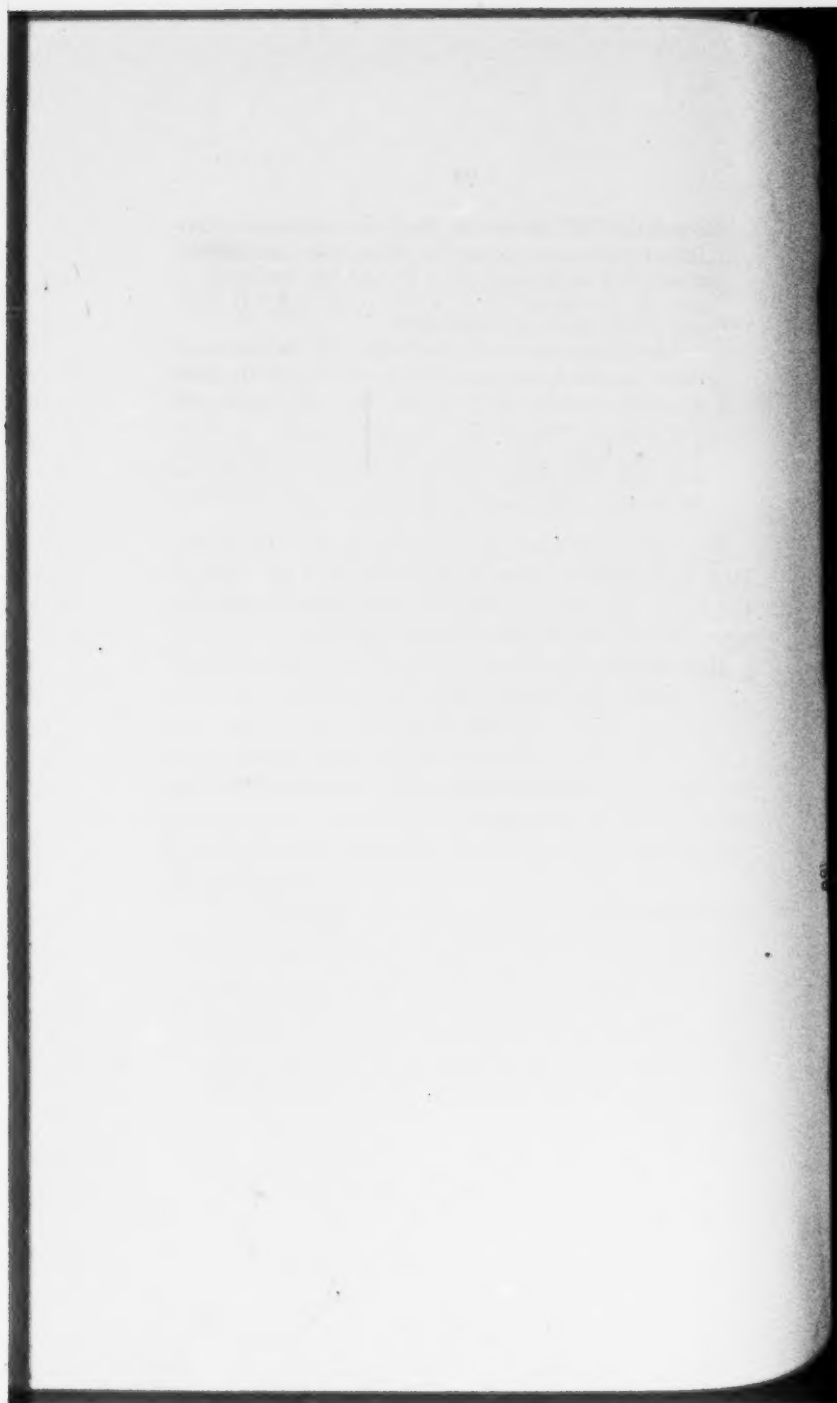
In the Supreme Court of the United States.

OCTOBER TERM, 1897.

WILLIAM FAXON, JR., TRUSTEE, ET AL.,
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v.
THE UNITED STATES ET AL. } No. 119.

APPEAL FROM THE COURT OF PRIVATE LAND
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BRIEF IN OPPOSITION TO MOTION TO FILE
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APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF IN OPPOSITION TO MOTION TO FILE ADDITIONAL EVIDENCE.

The power of this court to amend the record of the proceedings below under the act creating the Court of Private Land Claims, or cause additional testimony to be taken, was considered in the case of *United States v. Coe*, 155 U. S., 76, 84, wherein Mr. Chief Justice Fuller, for the court, said :

Under what circumstances and to what extent the power to amend the record of the proceedings below under this act, or to cause additional testimony to be taken, was intended to be exercised, we are not now

called upon to consider. The statute is not mandatory, but empowers the court to direct further proofs and to amend the record if in its judgment the case demands its interposition to that effect, and, as the question is one of power merely, and not properly arising for determination on this motion, we need not prolong these observations.

It is submitted that no such case is presented as "demands its interposition" and the exercise of such power.

In the same case it is said (p. 83):

The remedy by appeal, in its original sense, was confined to causes in equity, ecclesiastical, and admiralty jurisdiction. Undoubtedly appellate courts, proceeding according to the course of the civil law, may allow parties to introduce new allegations and further proofs, and such has been the settled practice of the ecclesiastical courts in England and of the admiralty courts in this country. Nevertheless, orders allowing this to be done are not granted as a matter of course, but made with extreme caution, and only on satisfactory grounds.

Appellant's motion in no way has a tendency to throw any light upon this case, and the report, the reliability of which is attacked, is not only the report of Special Agent Henry O. Flipper, but is the official report also of Special Agent Will M. Tipton. Whatever criticism counsel may see proper to make as to the credibility of Mr. Flipper on account of unfortunate occurrences in his past life, a sense of justice demanded that the court at the time should have understood that the report questioned was also the report of Special Agent Will M. Tipton. The far-reaching effect apparently sought by this insufficient presentation of the facts, without stating that it was a

joint report and without seeking to attack the credibility of Special Agent Tipton, who is as much responsible for the statement which counsel criticises as is Mr. Flipper, would seem to call for the exercise of that "extreme caution" in granting the motion and also to not be without its influence in determining whether there are "satisfactory grounds" upon which an order will be made responsive to the motion.

The motion states, "The purpose of this offer is to impeach the credibility of said Henry O. Flipper as a witness, for the reason, among others, that a certain report on the condition of the archives of Mexico was made BY HIM since the trial of this case, and has been filed on the part of the Government as evidence in this case without the consent, either oral or written, of this appellant or his counsel, and this appellant has had no opportunity, through counsel or otherwise, to cross-examine said Henry O. Flipper upon any of the facts recited in said report, and especially upon one recital contained therein at page 101 thereof, to the effect that no evidence of any kind appears in said archives of Mexico in relation to the grant which is the subject-matter of this suit, and for the reason that it is contended by this appellant that said recital in said *report by said Henry O. Flipper* is not true."

I take it that the report referred to is the official report of Special Agents Tipton and Flipper, which was filed generally with this court, and that the recital referred to as on page 101 is as follows :

163. Tumacácori, Calabazas y Huevabi. (Arizona.)

There is absolutely no record of this grant of any kind in the archives.

I attach hereto, as Exhibits A and B, translations of two certificates made by Mr. Victor Aguilar, treasurer-general of Sonora, in 1894. The original certificates in Spanish are among the files in my office at Santa Fe, N. Mex., and have been telegraphed for, and the same have now been mailed by special agents there to the clerk of this court.

I suggest to the court that the statement, the veracity of which is denied, is a statement embodied in the report compiled and signed by Special Agents Tipton and Flipper as a result of their joint examination of the archives and the certificates of Victor Aguilar, treasurer-general of Sonora, hereinabove referred to.

In all my connection with this litigation, I have never found an instance where Special Agent Tipton has been instructed to investigate and report upon a question of fact that his report could be criticised in the least as to its accuracy. This observation applies with equal force to Special Agent Flipper. The one feature that has made them so valuable and so strong is that in stating facts they have been scrupulously accurate and painstaking. I have on file in the office of the United States attorney for the Court of Private Land Claims at Santa Fe, N. Mex., two communications from counsel who has filed this motion, in which he commends this report and seeks a stipulation that this court might consider in evidence an additional report as to the condition of the book called *Toma de Razon*, made jointly by the same special agents, Will M. Tipton and Henry O. Flipper.

This additional report is entitled to no more credit than their original report. In one breath counsel seeks to stipulate into the record the work of Special Agents Tipton and Flipper, and in the next breath he denounces it as unreliable and untruthful. I call to the attention of the court this additional report, stipulated into the record at the instance of appellant's counsel and at his instance alone, which has been printed and is on file in this case, entitled "*Evidence introduced by stipulation.*" While the rule that one may not impeach his own witness may not have technical application, still, in my judgment, its spirit should not be without influence in determining whether this motion shall be granted.

On page 127 of the voluminous brief filed by counsel appears this statement:

Mr. Flipper was present in the Court of Private Land Claims during the trial of this case and heard the testimony of Mr. Rochin, and examined the documents which appear in the record between pages 238 and 239 and satisfied himself that the handwriting of said documents was that of clerks, who were in the Treasury Department at the date upon which those papers purport to have been made, and yet he makes the unqualified statement that "there is absolutely no record of this grant of any kind in the archives." The recklessness of such statements by Mr. Flipper is evidenced by the fact, that at no time did he ever have free and unrestrained access to all, or even to a considerable part, of the records relating to land grants in said archives at Hermosillo, etc.

The special attention of the court is directed to the statements made on pages 126 and 127 of that brief, and

also to the date of the instruments referred to (Rec., p. 238-239), which counsel makes the basis for his challenge of the integrity of their report as well as the subsequent work of these special agents. These instruments have been noticed in the Government's brief filed in this case, pages 60-64, and their dates seem sufficient to justify anyone in stating that there was *absolutely no record of the existence of this grant* in the archives. (*Vide Exhibits A and B herewith.*)

Aside from the objections to this motion heretofore stated, in justice to this court and to myself as the representative of the Government in the Court of Private Land Claims and in this court, I deem it proper to state that the matter of court-martial of Mr. Flipper was known to me prior to his employment as special agent of the Department of Justice and Spanish expert. Shortly after his appointment as such, the matter was brought to the attention of the Attorney-General (Mr. Olney) by way of charges made by one Bruce, which contained an affidavit or statement from an army officer—his name is not now recalled nor is it material—that Mr. Flipper had been found guilty by court-martial of conduct unbecoming an officer and a gentleman in making misstatements to his commanding officer and the sentence of dismissal from the Army approved. I suspended Mr. Flipper until I could give the matter of these charges full investigation and report to the Attorney-General such recommendations as might be deemed proper in the premises.

After the investigation was made, and having before that time had occasion to observe Mr. Flipper very carefully in his work in the Nogales grant (*Ainsa v. U. S.*, 161

U. S., 208), at which time he had not been employed by the Government, as well as careful inquiry into his private and public character in the community in which he had lived since leaving the Army, I reported to the Attorney-General that after careful and full examination into and consideration of all these matters I was satisfied that Mr. Flipper was the best equipped, most efficient, competent, reliable, and trustworthy man to perform the duties necessary to be performed on behalf of the Government in order that its interests might be conscientiously protected in this private land claim litigation in Arizona, and upon that report I was authorized by the Attorney-General to continue Mr. Flipper in the service of the Government.

Since then he has been constantly under my direction, and observation of his conduct, his work, the efficiency of it as well as its great volume, has only more firmly convinced me, as well as the community in which he has resided since leaving the Army, that he has been more sinned against than sinning.

The excitement and public notoriety occasioned by the private land claim litigation in Arizona has brought upon everyone connected with it on behalf of the Government the critical scrutinizing eyes of various adverse interests, as well as the general public, and this is the first attack upon the integrity of the work of anyone in the Government's interest; and every fact upon which this attack is based has been publicly known ever since a time before the inception of this litigation.

My investigations as to Mr. Flipper, and my subsequent observations of him, as well as my associations with

the people of Arizona, justify me in stating that no successful attack can be made upon his honesty, his integrity, and his reliability, and this is borne out by the general respect and esteem accorded him in the community where he lives and where these land grants are situated.

Having little in common with his race by reason of his talents, attainments, and education; sensitive in the extreme and fully understanding the social lines that the conventionalities of society have drawn against him; compelled by this ostracism to seek his books for companionship and recreation, he has equipped himself both in head and heart so as to obtain the respect and confidence of scholars and men of learning who know him or have examined his works. Even the litigants in these cases, with interests adverse to the Government, have very largely availed themselves of the work that this man has performed in behalf of the Government, and his labors in the office of the United States attorney for the Court of Private Land Claims for the past five years have been subjected to careful, critical, and rigid scrutiny, and that his duty has been accurately, conscientiously, and faithfully performed has never been questioned till now. Five judges, composing the Court of Private Land Claims, who have observed him carefully and closely since his original employment, will unite in commending his work and the integrity of it and the man.

In an official and expert capacity, by the side of Special Agent Will M. Tipton, who is recognized all over this country as the most competent Spanish scholar and expert of American birth, Special Agent Flipper—whom it is now sought to discredit by reason of a

court-martial many years ago, and under circumstances never satisfactory to the army officers who had occasion to know him in the performance of his duties on the frontier, and many of whom he served under—has made for himself a name and a credit, as a private citizen and a Government official, of which any man might well be proud. The record of this court-martial shows that he was convicted on a bare technicality, without culpability attaching thereto. It is within my personal knowledge that he has to-day the recognized friendship of many officers of the Army who served with him.

As a special agent, his work is imprinted in the records of this court in every Arizona case from the court below, and he has translated almost every law from the original Spanish which is to be found in the various books and briefs filed in these cases by the Government. The accuracy of these translations, even the coloring of a word, has never been questioned by any Spanish scholar of standing, and, as is known to this court, the improper coloring of a word in translation might lend a meaning very much different from that intended; yet all of his translations, investigations, and reports have stood the test of adverse and rigorous investigation.

Had it been sought to attack the credibility of this man in any of these cases on the trials below, it was well known that such an attack could have been successfully and easily overcome by the testimony of citizens of his own community, and I submit that the purpose of this motion should fail of its accomplishment here, just as it would have failed in the court below.

As to the employment of Mr. Flipper by the Government, I am responsible for it, and from the time of his appointment up to the present time I have been and am exceedingly glad that I have had his aid, assistance, and support in this trying, difficult, and perplexing litigation. In every Arizona grant, save one, the work of this man as a scholar, a translator, a surveyor, an engineer, an expert, a student of Spanish and Mexican law, and as an ordinary witness has been under investigation, and during his whole employment of over five years, after counsel and claimants availing themselves of the result of his labor, criticising and examining his work, and relying upon it in many instances (vide, page 10, Additional Brief of appellant in this case, filed March 19, 1898), making no challenge heretofore as to the vast product of his expert skill and ability that is now in cold type before this court interspersed throughout the records of the Arizona cases in this court and the court below, this is the first and only time it has ever been questioned.

After this long period of careful and serious observation in an official capacity of his ability and as applied to the performance of his labors, it has become my duty to appreciate it and my pleasure to commend it without a single reservation.

I respectfully submit that the motion to present additional evidence, as submitted by counsel, should be denied.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

EXHIBIT A.

I, Victor Aguilar, treasurer-general of the State of Sonora, Republic of Mexico,

Certify that there does not exist in the archives of this office any record of the sale the intendant and treasurer-general, Don Antonio Lopez, made in the year 1844 to Don Francisco Alejandro Aguilar of the lands of the Tumacácori and stock farm of the same at the places Guebavi, Potrero, Cerro de San Cayetano, and Calabazas.

And at the request of the commissioner of the American Government, Mr. H. O. Flipper, I give the present certificate in the city of Hermosillo on the twelfth day of the month of March, eighteen hundred and ninety-four.

V. AGUILAR.

EXHIBIT B.

I, Victor Aguilar, treasurer-general of the State of Sonora, Republic of Mexico,

Certify: That the original title or matrix of the town site (fundo) and stock farm (estancia) of the town of Tumacácori, issued by the intendant in the year 1807, does not exist in the archives of this office.

And at the request of the commissioner of the American Government, Mr. H. O. Flipper, I give the present certificate, in the city of Hermosillo, on the twelfth day of the month of March, eighteen hundred and ninety-four,

V. AGUILAR.